IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-703

BERNARD CAREY, as State's Attorney of Cook County, Illinois,

Appellant,

vs.

ROY BROWN, et al.,

Appellees.

Appeal from the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT FOR APPELLANT BERNARD CAREY

BERNARD CAREY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-5444,
Attorney for Appellant Carey.

PAUL P. BIEBEL, JR.,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

ELLEN G. ROBINSON,
Assistant State's Attorney,
Of Counsel.

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JURISDICTIONAL STATEMENT FOR APPELLANT BERNARD CAREY

The appellant, Bernard Carey, as State's Attorney of Cook County, Illinois, appeals from the final judgment of the United States Court of Appeals for the Seventh Circuit, dated August 2, 1979, holding that the Illinois Residential Picketing Statute, Ill. Rev. Stat. ch. 38, §§ 21.1-1 through 21.1-3 (1969), violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 602 F.2d 791 (7th Cir. 1979). It appears in Appendix A to this Statement at pp. 1a-10a, *infra*.

The opinion of the district court is reported at 462 F. Supp. 518 (N.D. Ill. 1978). This opinion is reprinted in Appendix B at p. 11a, *infra*.

JURISDICTION

The appellees brought this action under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343 and 2201. They sought a declaration that the Illinois Residential Picketing Statute, Ill. Rev. Stat., ch. 38 § 21.1-1 *et seq.*, is unconstitutional on its face and as applied, and they sought to have the appellants preliminarily and permanently enjoined from enforcing the Statute. The district court upheld the Statute, but the Court of Appeals for the Seventh Circuit reversed on the ground that the Statute violates the Equal Protection Clause of the Fourteenth Amendment.

The Seventh Circuit's opinion was entered on August 2, 1979. Appellant Carey's notice of appeal was filed in the Seventh Circuit on October 4, 1979. The jurisdiction of this Court to hear this appeal rests upon 28 U.S.C. § 1254(2).

STATUTE INVOLVED

Illinois Revised Statute, ch. 38,
§§ 21.1-1 through 21.1-3:

"§ 21.1-1. Legislative finding and declaration.] The Legislature finds and declares that men in a free society have the right to quiet enjoyment of their homes; that the stability of community and family life cannot be maintained unless the right to privacy and a sense of security and peace in the home are respected and encouraged; that residential picketing, however just the cause inspiring it, disrupts home, family and communal life; that residential picketing is inappropriate in our society, where the jealously guarded rights of free speech and assembly have always been associated with respect for the rights of others. For these reasons the Legislature finds and declares this Article to be necessary.

§ 21.1-2. Prohibition—Exceptions.] It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.

§ 21.1-3. Sentence.] Violation of Section 21.1-2 is a Class B misdemeanor."

QUESTION PRESENTED

Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes, but permits limited picketing of homes used for non-residential public purposes?

STATEMENT OF THE CASE

The appellees characterize themselves as civil rights activists. In 1976 some of them were arrested while participating in a pro-busing picket on the sidewalk in front of the home of the then-Mayor of Chicago, Michael Bilandic. The picketers pleaded guilty to violating the Illinois Residential Picketing Statute.

The following year the appellees wished to renew the residential picket of the Mayor, but feared rearrest. Indeed, it is conceded that if the appellees had again conducted a pro-busing picket of the Mayor's home, they would again have been arrested and prosecuted for violating the Residential Picketing Statute. Rather than expose themselves to additional criminal prosecution, the appellees filed this Section 1983 action, seeking a declaration that the Residential Picketing Statute is unconstitutional, and requesting that its enforcement be enjoined.

Ruling on cross-motions for summary judgment supported by affidavits and briefs, the district judge denied all relief, upholding the constitutionality of the Statute. However, the Seventh Circuit reversed, ruling that this Court's decision in *Police Department of the City of Chicago v. Mosely*, 408 U.S. 92 (1972), compelled a finding that the Statute violates the Equal Protection Clause of the Fourteenth Amendment. Appellant Carey appeals from that determination.

THE QUESTION IS SUBSTANTIAL

Introduction

The Court has recognized the State's power to protect its citizens from becoming captive audiences in their own homes. *Rowan v. Post Office Dept.*, 397 U.S. 728, 735-738 (1970); *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 616-620 (1976). This appeal tests the scope of that power.

The Illinois Residential Picketing Statute, which generally bans all residential picketing, was enacted in order to enhance peace and privacy in the home. In recognition of the fact that a residence may also be the situs of a business enterprise or employment relationship, the Illinois Residential Picketing Statute exempts a narrow range of picketing from its general ban, and permits residential picketing of businesses and of homes involved in labor disputes. Although the Supreme Court

of Wisconsin and a three-judge panel from Connecticut have recently upheld similar statutes,* the Seventh Circuit ruled that the statutory exemptions from the picketing ban are "content regulations" of speech obnoxious to the Equal Protection Clause as construed in *Police Department of the City of Chicago v. Mosely*, 408 U.S. 92 (1972).

In *Mosely* this Court invalidated an ordinance which prohibited all picketing around schools except for labor picketing at schools involved in labor disputes. The stated purpose of the *Mosely* ordinance was to prevent classroom disruption in *public* school buildings. By contrast, the purpose of the Illinois Residential Picketing Statute is to promote privacy and peaceful repose within *private* homes. Privacy of a resident in a private dwelling is an interest of entirely different origin and dimension than quiet in the classrooms of a public building. Nevertheless, the Seventh Circuit struck the Illinois Residential Picketing Statute because it could find "no principled basis for distinction" between the protection of peaceful private homes and quiet public schools. *Brown v. Scott*, 602 F.2d 791, 794 (7th Cir. 1979).

Appellant Carey respectfully urges this Court to grant plenary review of the Seventh Circuit's opinion. With its heavy handed application of *Mosely* the Seventh Circuit unnecessarily minimizes the fundamental right to residential privacy and discourages legislative efforts to regulate First Amendment activity with sensitivity to the competing interests affected.

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* *City of Wauwatosa v. King*, 49 Wisc. 2d 398, 182 N.W.2d 530 (1971). *DeGregory v. Giesing*, 427 F. Supp. 910 (D. Conn. 1977).

Argument

The *Mosely* opinion was not intended to create a *per se* rule against all content selective picketing regulations, and this Court has cautioned against indiscriminate application of *Mosely* rhetoric. *See Young v. American Mini Theatres*, 427 U.S. 50, 64-65 (1976). But the *Young* warning against reading *Mosely* literally and without regard to the facts of the case does not undermine *Mosely*; it rather reflects the limitations which *Mosely* imposes upon itself:

> "This is not to say that all picketing must always be allowed. . . . there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets. Conflicting demands on the same place may compel the State to make choices among users and uses. . . . But these justifications for selective exclusions from a public forum must be carefully scrutinized. . . . *discriminations among pickets must be tailored to serve a substantial governmental interest.*" *Mosely* at 98. (Emphasis supplied.)

Residential privacy, the interest served by the Illinois Residential Picketing Statute, is indeed a "substantial governmental interest." Supreme Court cases have firmly established that the right to privacy in the home is a fundamental individual right, of sufficient dignity to countervail the First Amendment rights of picketers who would convey uninvited messages to the resident at rest in his own home.

This Court first noted the fundamental right to residential privacy in *Martin v. Struthers*, 319 U.S. 141 (1943), in which the Court struck an ordinance banning all door-to-door leafletting, while nevertheless recog-

nizing that residents have protectible property interests in the quiet and peaceful enjoyment of their homes. *Id.* at 143-144. In the later case of *Breard v. City of Alexandria, La.*, 341 U.S. 622 (1951), these protectible privacy interests were held to outweigh the rights of commercial vendors who sought to engage in door-to-door solicitation.

More recently, the residential privacy right was bolstered when it merged with the captive audience doctrine, which recognizes that while the First Amendment generally requires that persons be permitted to speak, it does not force intended targets to listen. The earliest captive audience case was *Kovacs v. Cooper*, 336 U.S. 77 (1949), in which the Court upheld an ordinance banning loud, raucous soundtrucks from broadcasting on city streets. The unwilling listener, the Court reasoned, cannot avoid hearing the loud broadcast. "In his home or on the street he is practically helpless to escape this interference with his privacy by loudspeakers . . ." *Id.* at 87. Three years later, however, personal privacy and the captive audience doctrine were rejected as a ground for banning commercial radio broadcasts on public buses. *Public Utilities Comm'n. v. Pollak*, 343 U.S. 451 (1952). The majority noted this significant distinction: "*However complete . . . [a citizen's] right of privacy may be at home*, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare . . ." *Id.* at 464. (Emphasis supplied.)

Finally, in 1970, the Court was squarely presented with facts which implicated both residential privacy rights and the captive audience doctrine. In *Rowan v. United States Post Office Dept., supra*, 397 U.S. 728, the

Court upheld a regulation which permitted addressees to direct the Postmaster not to deliver "pandering" advertisements. Speaking for a unanimous Court, Chief Justice Burger declared:

> "We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even good ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." *Id.* at 738.

Opinions following *Rowan* have treated as established beyond cavil the residential privacy/captive audience doctrines as endowing the resident with the power to censure all uninvited communication. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1970); *Cohen v. California*, 403 U.S. 15, 21 (1971); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975). Surely, if under *Rowan* a resident is entitled to prevent an intrusion into his privacy as minor as unwanted mail, he has a right to prevent intrusions as major as unwelcomed picketers.

The very existence of this fundamental right implies a power on the part of the State to act to protect it by legislation. *Hynes v. Mayor and Council of Borough of Oradell, supra* 425 U.S. at 620. However, that power must be carefully exercised, particularly where First Amendment conduct may be affected, as in the First Amendment area "government may regulate . . . only with narrow specificity." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). In order to accord with this well-

established principle, legislation enacted to enhance residential privacy must not be broader than the limits of the privacy interest the legislation seeks to protect. A citizen's right to privacy in his home is not absolute or inalienable. The citizen himself dilutes it when he voluntarily opens his home for a non-residential purpose or chooses to permit his home to be the situs of an employment relationship.

The Equal Protection Clause requires the same narrow specificity in regulations which affect speech as does the First Amendment. That was this Court's unmistakable message in *Mosely:*

> ". . . discriminations among picketers must be tailored to serve a substantial governmental interest." *Mosely* at 98.

The Illinois Residential Picketing Statute admittedly draws "discriminations" among picketers, but the discriminations drawn are narrowly tailored to the interest the Statute serves: residential privacy. Each exception to the general residential picketing ban is tied to the function of the target residence. The exceptions reflect the indisputable fact that when a residence is being used as a business, a place of employment, or a public meeting place, its functions are expanded beyond a mere home whose security, peace and privacy are of legislative and constitutional concern.

The Seventh Circuit's terse opinion ignores the complexities of drawing a residential picketing statute which treads the narrow path between First and Fourteenth Amendment pitfalls. Other courts have, however, been more sensitive to the legislative drafting problems. The Supreme Court of Wisconsin has upheld a residential picketing statute substantially identical to

the Illinois law, noting that it viewed the labor exception "not as denying, but as assuring, equal protection by limiting the ban on picketing the home to picketing it *as a home, and permitting picketing of it as a place of employment whenever it is also that.*" *City of Wauwatosa v. King*, 49 Wisc. 2d 398, 182 N.W. 2d 530, 536 (S.Ct. Wisc. 1971). (Emphasis supplied.)* A three-judge court from Connecticut has upheld a state statute which prohibits only labor-related residential picketing. *DeGregory v. Giesing*, 427 F. Supp. 910 (D. Conn. 1977). That court recognized that *Mosely* appeared to be dispositive of the equal protection attack, but decided that upon careful reading *Mosely* permits selective picketing regulations where the classifications "are precisely tailored to serve a substantial governmental interest." *Id.* at 913-914.

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* One circuit has upheld a residential picketing statute which did not contain exemptions for situations where a resident voluntarily relinquishes his reasonable expectation of privacy. *Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1973), *cert. denied* 421 U.S. 971 (1975). But that decision is limited to the constitutionality of the statute *as applied*, and the court specifically declined to reach the issue of the statute's facial constitutionality. *Id.* at 543. It is at least arguable that such a statute is overbroad and on its face violates the First Amendment.

CONCLUSION

It is always a serious matter when federal courts strike state statutes. It is even more serious when the stricken statute protects important state and individual interests. This Court has often warned federal courts to exercise caution when called upon to second-guess state legislative judgments. *E.g., Young v. American Mini Theatres, Inc., supra* 427 U.S. at 70. Appellant Carey respectfully suggests that the Seventh Circuit failed to exercise requisite caution in striking the Illinois Residential Picketing Statute on *Mosely* grounds. Under these circumstances and for all the reasons stated above, this Court should note probable jurisdiction of this appeal, and upon full briefing and argument by the parties, reverse the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

BERNARD CAREY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-5444,
Attorney for Appellant Carey.

PAUL P. BIEBEL, JR.,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

ELLEN G. ROBINSON,
Assistant State's Attorney,
Of Counsel.

October 31, 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78-2432

ROY BROWN, et al.,

Plaintiff-Appellants,

v.

WILLIAM J. SCOTT, et al.,

Defendant-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-C-1105—**John F. Grady**, *Judge.*

ARGUED APRIL 20, 1979—DECIDED AUGUST 2, 1979

Before TONE, BAUER, *Circuit Judges*, and SOLOMON, *Senior District Judge.**

TONE, *Circuit Judge.* The Illinois Residential Picketing Statute, Ill. Rev. Stat. ch. 38, §§ 21.1-1 through 21.1-3 (1977), makes the picketing of residences or dwellings a misdemeanor, with certain enumerated exceptions. The district court held the statute constitutional, rejecting plaintiffs' equal protection, overbreadth, and vagueness arguments. We hold that the statute violates the equal protection clause of the Fourteenth Amendment as interpreted in *Police Department of*

* The Honorable Gus J. Solomon, Senior District Judge of the United States District Court for the District of Oregon, is sitting by designation.

Chicago v. Mosley, 408 U.S. 92 (1972), and we therefore reverse the judgment.

Plaintiffs are the Committee Against Racism, an unincorporated association, and fifteen individual members of that association. The defendants, all sued in their official capacities, are various state, county, and city officials responsible for enforcing the statute. On September 7, 1977, fourteen of the individual plaintiffs engaged in peaceful picketing on the public sidewalk in front of the residence of Michael A. Bilandic, then Mayor of Chicago, to protest his policies concerning the busing of school children to achieve racial integration. They were subsequently charged with violating the residential picketing statute, pleaded guilty to the charge, and were sentenced to periods of supervision.

Plaintiffs later filed this action seeking a declaratory judgment that the statute is unconstitutional on its face and as applied, and an injunction to prohibit defendants from enforcing the statute. Ruling on cross-motions for summary judgment, the district court held the statute valid and entered a summary judgment in favor of the defendants, from which plaintiffs appeal.

I.

Defendants raise the issue of mootness in view of Mayor Bilandic's departure from office while the appeal has been pending. Although it is true that the affidavits filed by several of the plaintiffs express a specific desire to picket "Mayor Michael A. Bilandic's residence," they allege in the complaint that they "wish to engage again in residential picketing to demonstrate in Chicago neighborhoods their concern for racial equality, civil rights and racial integration . . . ." The mayoral change does not alter this intention or defendants' expressed intention to enforce the statute. Consequently, it cannot be said with assurance that there is no reasonable expectation that the alleged violation will recur. Nor have the interim events completely and irrevocably eradicated the effects of the alleged violation. *County of Los Angeles v. Davis*, ... U.S. ....., ..., 99 S.Ct. 1379, 1383 (1979). There remains "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974), quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *see Allee v. Medrano*, 416 U.S. 802, 810-811 (1974). The case is therefore not moot.

II.

The substantive provisions of the challenged statute are as follows:

> It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute[1] or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.

Ill. Rev. Stat. ch. 38, § 21.1-2.

In *Police Department of Chicago v. Mosley, supra*, 408 U.S. 92, the Court held invalid a similar picketing prohibition containing a similar labor picketing exception. The Chicago ordinance before the Court in that case prohibited picketing at any school other than a school involved in a labor dispute.[2] The Court held that

[1] Although the statute does not expressly limit the subject matter of the picketing allowed at such a residence, the parties do not dispute that the exception applies only to labor picketing related to the dispute. The Chicago ordinance, quoted in this opinion at note 2, *infra*, challenged in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), was similarly vague. *See* 408 U.S. at 95 n.2.

[2] Chicago Municipal Code ch. 193-1(i) (1968) read in relevant part:

> A person commits disorderly conduct when he knowingly:
>
> . . .

(Footnote continued on following page)

the ordinance violated the equal protection clause by allowing labor picketing while prohibiting other kinds of picketing when the former is not "clearly more disruptive than" the latter. 408 U.S. at 101. The Court concluded,

> The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objections. . . . Far from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, it may not stand.

Id. at 102.

III.

The district court held, and defendants argue, that plaintiffs lacked standing to challenge the statute on the *Mosley* ground. The court read the labor exception as creating two sets of classifications: the classification of "place of employment" as opposed to "residence," and that of "place of employment involved in a labor dispute" as opposed to "place of employment not involved in a labor dispute." Plaintiffs, the court held, had standing to challenge only the first classification, which regulates only the location of picketing and does not violate the equal protection clause because it is supported by the compelling state interest of providing a meaningful forum for labor picketers. Recognizing that the second classification might deny some picketers equal protection under the *Mosley* holding, the court held that it did not so affect plaintiffs because they did not seek to picket a "place of employment." The district court reasoned that the

[2] *continued*

> (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided, that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . . .

plaintiff in *Mosley* had standing to challenge the ordinance because he sought to picket at a school, a location at which the ordinance permitted labor picketing, but plaintiffs here seek to picket "residences" rather than "places of employment," at which the statute permits labor picketing.

We think this interpretation of the statute is incorrect. Section 21.1-2 is concerned with "residences and dwellings," not with other places, and the brief article of the Illinois Criminal Law and Procedure Code of which that section is a part is concerned solely with "residential picketing." Although the second clause of the second sentence of § 21.1-2, the "place of employment" clause, does not use the words "residences and dwellings," it refers to such places and only such places. The only prohibition contained in the section or the article is against picketing "before or about the residence or dwelling of any person." Unless the "place of employment" clause refers to a place of employment that is also a residence or dwelling, the clause is utterly unnecessary, because nothing in the article purports to prohibit picketing at any place that is not a residence or dwelling.[3] *Accord, People Acting Through Community Effort v. Doorley*, 468 F.2d 1143, 1146 (1st Cir. 1972).[4]

[3] Also for a similar reason, the "place of employment" clause refers to a place of employment that is not "used as a place of business"; for if it is used as a place of business it is already excepted from the coverage of the section by the "except" clause of the first sentence. Accordingly, the statute allows labor picketing or any other kind of picketing at residences or dwellings that are used as places of business.

[4] The court held that "lawful . . . labor picketing at residential sites" was permitted by an ordinance that read in relevant part as follows:

> [I]t shall be unlawful for any person to engage in picketing before or about the residence or dwelling of any individual. Nothing herein shall be deemed to prohibit (1) picketing in any lawful manner during a labor dispute of the place of employment, involved in such labor dispute . . . .

468 F.2d at 1146.

Accordingly, at a residence that is also a place of employment, the statute allows labor picketing but not picketing for any other purpose.

Defendants also argue that plaintiffs lack standing to assert the *Mosley* rule because there was no labor dispute at the Bilandic house, so the labor exception is inapplicable. This argument is defeated by the *Mosley* case itself. The plaintiff in *Mosley* was accorded standing even though the school he sought to picket was not "involved in a labor dispute" and thus could not have been the site of labor picketing. We are not free to assume that the Supreme Court overlooked the standing issue. The implicit holding that the plaintiff in *Mosley* had standing requires us to hold that plaintiffs here have standing even though the residences they seek to picket may not be "places of employment involved in a labor dispute" at the time they picket.

IV.

The *Mosley* case is also controlling on the merits. Applying its reasoning we are required to conclude that because Illinois allows peaceful labor picketing at a residence it has determined that such picketing "is not an undue interference" with the peace and privacy of the home. 408 U.S. at 100. The equal protection clause does not permit Illinois to prohibit other kinds of picketing "unless that picketing is clearly more disruptive than the picketing [Illinois] already permits. . . . 'Peaceful' nonlabor picketing, however the term 'peaceful' is defined, is obviously no more disruptive than 'peaceful' labor picketing. But [Illinois' statute] permits the latter and prohibits the former." 408 U.S. at 100; *see also People Acting Through Community Effort v. Doorley, supra*, 468 F.2d at 1146.

Defendants contend that we should not follow *Mosley* for three reasons. None is persuasive.

First, defendants argue that *Mosley* is not a controlling precedent after *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). A sufficient answer is that the portion of Mr. Justice Stevens' opinion relied on

in that case, Part III, was joined in by only four of the nine participating justices and so could not in any event be taken to have abrogated *Mosley*. Moreover, Mr. Justice Stevens does not suggest in Part III of the opinion that *Mosley* was incorrectly decided. He states only "that broad statements of principle," such as the language in *Mosley* about regulating speech on the basis of its content, "no matter how correct in the context in which they are made," are not necessarily to be carried to their logical extremes. 427 U.S. at 65-66. We detect in Part III no disapproval of the decision in *Mosley*, based as it was on equal protection grounds although carrying First Amendment overtones. Moreover, two years after *Young* the Court cited *Mosley* with approval. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978).

Defendants attempt to distinguish the statute challenged here from the *Mosley* ordinance because its picketing prohibition applies at residences rather than at schools. The rights affected by the two laws are the same, however, and the state interests served by both laws are substantial. We can see no principled basis for this distinction, and counsel could not supply such a basis when asked to do so at oral argument. We agree with the First Circuit's application of the *Mosley* rationale to a residential picketing statute in *People Acting Through Community Effort v. Doorley, supra*, 468 F.2d at 1145-1146.

Defendants also attempt to distinguish the challenged statute from the *Mosley* ordinance by arguing that the use of a residence as a "place of employment" changes its character so that the different treatment afforded labor and nonlabor picketing is justified by the differences in the locations involved. We find no principled basis in this distinction for holding *Mosley* inapplicable.

Under *Mosley* the statute, as applied to plaintiffs and on its face,[5] violates the equal protection clause of the

[5] Although the Supreme Court did not specifically state that the ordinance in *Mosley* was facially unconstitutional, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), a companion

(Footnote continued on following page)

Fourteenth Amendment.[6] Our holding implies neither disparagement of the important state interest in protecting the peace and privacy of the home[7] nor an opinion that the state may not prohibit or regulate residential picketing in a manner consistent with the equal protection clause as interpreted in *Mosley*.

V.

Plaintiffs also complain of the district court's denial of class certification. In a number of cases this court has held that if the requirements of Rule 23 are satisfied class certification should not be refused because of lack of need. *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th

[5] *continued*
case to *Mosley*, the Court expressly held an identical ordinance invalid on its face for the reasons given in *Mosley*. 408 U.S. at 106-107 & nn.1-2.

[6] The labor dispute exception is not severable from the remainder of the statute because its excision would subject a group of persons to criminal sanctions that the Illinois General Assembly did not intend to subject to those sanctions, *viz.*, persons engaged in peaceful labor picketing at a "place of employment involved in a labor dispute." *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902); *accord, State v. Schuller*, 280 Md. 305, 372 A.2d 1076, 1083-1084 (1977). Hence the statute in its entirety must fall and we need not consider the constitutionality of a prohibition of residential picketing or of the statute's other exceptions to the prohibition.

[7] The "Legislative Finding and Declaration" that is a part of the Illinois Residential Picketing Statute describes the interest the statute is intended to serve in the following words:

> The Legislature finds and declares that men in a free society have the right to quiet enjoyment of their homes; that the stability of community and family life cannot be maintained unless the right to privacy and a sense of security and peace in the home are respected and encouraged; that residential picketing, however just the cause inspiring it, disrupts home, family and communal life; that residential picketing is inappropriate in our society, where the jealously guarded rights of free speech and assembly have always been associated with respect for the rights of others. For these reasons the Legislature finds and declares this Article to be necessary.

Cir. 1978); *Vickers v. Trainor*, 546 F.2d 739, 747 (7th Cir. 1976); *Fujishima v. Board of Education*, 460 F.2d 1355, 1360 (7th Cir. 1975). In sustaining a class certification order in *Alliance To End Repression v. Rochford*, 565 F.2d 975, 980 (7th Cir. 1977), the court assumed the existence of a need criterion for class certification, and suggested that there is little need for a class action when the issue is the constitutionality of a statute or regulation on its face. Without questioning the soundness of that suggestion, we nevertheless feel bound by the *Hampton*, *Vickers*, and *Fujishima* decisions to require class certification in this case.

The case is remanded to the district court for the purpose of certifying an appropriate class and the entry of a final judgment consistent with this opinion.

REVERSED AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

OPINION BY JUDGE TONE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

August 2, 1979

Before
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. GUS J. SOLOMON, *Senior District Judge**

ROY BROWN, et al.,

Plaintiffs-Appellants,

No. 78-2432 vs.

WILLIAM J. SCOTT, Attorney General of Illinois, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78-C-1105 — JOHN F. GRADY, *Judge Presiding.*

ORDER

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and REMANDED, in accordance with the opinion of this court filed this date.

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* The Honorable Gus J. Solomon, Senior District Judge of the United States District Court for the District of Oregon, is sitting by designation.

APPENDIX B

Roy BROWN et al., Plaintiffs,

v.

William J. SCOTT et al., Defendants.

No. 78 C 1105.

United States District Court,
N. D. Illinois, E. D.

Sept. 27, 1978.

GRADY, District Judge.

Plaintiffs are various members of the Committee Against Racism ("CAR"). On September 6, 1977, at approximately 6:15 p.m., several of the plaintiffs peacefully demonstrated on the sidewalk in front of Mayor Bilandic's home in order to protest his failure to support busing as a means of achieving racial integration. (Complaint, par. 6). These plaintiffs were arrested for disorderly conduct and for violating the Illinois Residential Picketing Statute. Ill.Rev.Stat. ch. 38, § 21.1-1 et seq. In exchange for dismissal of the disorderly conduct charge, the plaintiffs pled guilty to the charge of unlawful residential picketing. (Complaint, par. 11). Some of these plaintiffs were sentenced to six months supervision, and some were sentenced to one year of supervision. Those subject to the six month supervision have already served their sentences while those subject to the one year of supervision will have completed their sentences on October 18, 1978. (Complaint, par. 12). In addition to the plaintiffs who have been arrested and pled guilty, there are several other members of the Committee Against Racism who have joined as parties plaintiff. One of these, David Smith, participated in the picketing on September 6, 1977, but was not arrested. (Complaint, par. 3(d)). Another member, Joan Raisner,

did not participate in the September 6 picketing. (Complaint, par. 3(e)). All of the plaintiffs allege that they wish to picket various Chicago residences and to express their views on racial integration but that the threat of future prosecution under the residential picketing statute has inhibited them. (Complaint, par. 14). More specifically, plaintiffs Buckhoy, Campbell, Brown, Smith and Raisner state in affidavits that the issue of busing to achieve integration has again become topical and that, but for the threat of arrest under the residential picketing statute, they would again picket Mayor Bilandic's home in the same manner and for the same purpose as their September 6 picketing. Plaintiffs seek a judgment declaring that the Illinois Residential Picketing Statute is unconstitutional on its face and as applied, and an injunction against state, county, and city officers prohibiting their enforcement of the statute. Defendants have moved to dismiss the complaint and to deny the injunctive relief. After the preliminary hearing, the parties filed cross motions for summary judgment.

Preliminary Matters

At the outset, we believe it advisable to express our understanding of the nature of this case. In our view, plaintiffs are not attempting to collaterally attack or in any way impeach their pleas of guilty before the state court. Although their former arrest and prosecution may be evidence of a likelihood of future arrest for similar conduct, their request for relief is solely prospective in nature, *i.e.*, a declaration that their intended future picketing is protected by the First Amendment against arrest under the Illinois Residential Picketing Statute. With this appreciation of the case, we must quickly reject several of defendants' arguments.

Defendant City of Chicago argues that plaintiffs should be collaterally estopped from raising the unconstitutionality of the Illinois Residential Picketing Statute because of their failure to raise that issue in their earlier state criminal proceeding. According to Moore,

the doctrine of collateral estoppel applies in the following situation:

> Where there is a second action between parties, . . . who are bound by a judgment rendered in a prior suit, but the second action involves a different claim, cause, or demand, the judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended.

1B Moore's Federal Practice: par. 0.441[2], at 3777 (2d ed. 1974). A critical requirement of the doctrine is that the issue sought to be precluded in the second suit must actually have been litigated in the first suit. According to the complaint, however, the plaintiffs who were prosecuted in the state criminal proceeding never raised the issue of the Illinois statute's constitutionality but rather entered a plea of guilty. In the former proceeding then, the constitutional issue was not actually litigated, and the doctrine of collateral estoppel therefore cannot be invoked to bar litigation of the constitutional issue in this court.[1]

It is possible that defendant City of Chicago intends to invoke the doctrine of res judicata rather than that of collateral estoppel. Res judicata, however, is equally inapplicable. Under the doctrine of res judicata, a final judgment on the merits in a prior suit between the same

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[1] Defendant relies on *Nathan v. Tenna*, 560 F.2d 761 (7th Cir. 1977). In that case the Seventh Circuit held that pleading guilty in a prior criminal proceeding collaterally estopped the pleader from denying the illegality of his conduct in a later civil action for enforcement of a contract. *Nathan*, however, is distinguishable. Unlike *Nathan*, plaintiffs in this case do not seek to litigate an issue already determined in the prior criminal proceeding: their past violation of the residential picketing statute. Rather, they seek to litigate an issue not previously determined: whether plaintiffs' contemplated picketing is protected by the First Amendment against a future prosecution under the Illinois Residential Picketing Statute.

parties or their privies bars a second suit based on the same cause of action. 1B Moore's Federal Practice: par. 0.405[1], at 622 (2d ed. 1974). Critical to this doctrine is the requirement that the second suit be based on the same cause of action. Although courts have differed over what constitutes the same cause of action, it is clear that plaintiffs' present suit is not on the same cause of action as the prior criminal proceeding. In the prior suit, the cause of action was a criminal prosecution for violation of the Illinois Residential Picketing Statute occurring on September 6, 1977; in the present suit, the cause of action is for a declaratory judgment that a prosecution under the Illinois Residential Picketing Statute for future picketing would be unconstitutional. Although the same issue could be raised in each suit, these suits are clearly not based on the same cause of action Therefore, res judicata does not bar this suit.

Defendant Carey has urged another argument based on the plea of guilty in the prior criminal proceedings. Carey asserts that by pleading guilty, plaintiffs have waived a challenge to the constitutionality of the proceedings in which they were convicted and to the constitutionality of the statute under which they were convicted. *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). This is an accurate statement of the law, but defendant's argument seeks to apply the waiver doctrine beyond its established bounds. A guilty plea operates to waive a constitutional challenge to the statute only for the proceeding in which the plea is entered. Thus, a person who has pleaded guilty may not assert such constitutional infirmities on appeal or by way of collateral review. Pleading guilty and waiving constitutional infirmities in one suit, however, does not waive those same constitutional infirmities in a second, entirely distinct suit. If, for example, the plaintiffs were arrested a second time for violating the residential picketing statute, their plea of guilty in the previous prosecution would not waive their right to challenge the constitutionality of that statute in the second prosecution. The result is no different when the

second suit is one for a judgment declaring future conduct protected by the Constitution rather than for prosecution of that future conduct. Thus, plaintiffs' plea of guilty to their criminal prosecution under the Residential Picketing Statute does not waive their right to challenge the constitutionality of this statute as applied to their future picketing.

In addition to the legal reasons outlined above, these defendants' arguments must be rejected for a purely factual reason. Each of the arguments applies only to those plaintiffs who were arrested for violating the picketing statute and who then pleaded guilty to the offense. There are two plaintiffs in this case, David Smith and Joan Raisner, who have never been prosecuted under the statute. As to them, the defendants' arguments clearly have no force.

Abstention

In the landmark cases of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), the Supreme Court held that a federal court should abstain from deciding a constitutional issue and granting either injunctive or declaratory relief whenever the constitutional claim may be raised in a pending State criminal proceeding. If, on the other hand, no state criminal proceeding is pending, the federal court need not abstain from issuing a declaratory judgment on the constitutional ground, even in the absence of the requirements for an injunction. *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). According to the complaint, there is no state criminal proceeding pending against any of the plaintiffs.[2] Thus,

[2] Some of the plaintiffs have not finished serving the sentences imposed in the earlier state prosecution. Although part of a sentence is pending, the prosecution itself has been completed and, for the purposes of *Younger* abstention, is no longer pending. *Cf. Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977).

under the rationale of *Steffel*, we need not abstain from issuing a declaratory judgment in this case.

Defendants argue that *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977) has changed the law as enunciated in *Steffel*, quoting the following passage: "Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention." 430 U.S. at 337, 97 S.Ct. at 1218 (emphasis in original; footnote omitted). We believe that this passage, when read in context, does not support abstention in the present case. In *Juidice*, the appellees failed to satisfy judgments obtained against them in pending state civil proceedings. Although the appellant state judges issued orders to show cause why appellees should not be held in contempt, appellees failed to respond in any way and failed, in particular, to challenge the constitutionality of the contempt statute. The appellants held the appellees in contempt and imprisoned them. Without challenging the constitutionality of this action in the pending state proceeding, appellees filed a suit in federal court under 42 U.S.C. § 1983, challenging the constitutionality of the contempt statute. In an attempt to avoid the *Younger* abstention requirement, the appellees cited *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), a case in which the petitioner was permitted to challenge the legality of his pretrial detention in a federal court suit, despite the pendency of his state criminal prosecution. The *Juidice* Court distinguished *Gerstein* on the ground that since the illegality of pretrial detention could not be raised as a defense to the prosecution and the State court therefore could not try the constitutional issue, the federal court need not abstain from deciding that issue. It was in this context that the *Juidice* Court made its statement that *Younger* may be invoked provided there was an opportunity to present the constitutional issue to the state court. In the statement, the Court merely formulated a distinction between pending state proceedings in which the constitutional question could be

raised and pending state proceedings in which the constitutional question could not. But the *Juidice* Court did not alter the threshold requirement for *Younger* abstention: pendency of a state court proceeding. Moreoever, the *Juidice* Court did not expand the doctrine of abstention to require that by virtue of having an opportunity to raise a constitutional issue in a concluded state suit, a plaintiff will be precluded by the abstention doctrine from ever raising the same constitutional issue in an entirely distinct federal suit. In *Wooley*, the Court plainly affirmed this implicit conclusion:

> Here, however, the suit is in no way "designed to annul the results of a state trial" since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate appellees' constitutional rights. Maynard has already sustained convictions and has served a sentence of imprisonment for his prior offense. He does not seek to have his record expunged, nor to annul any collateral effects those convictions may have, *e. g.*, upon his driving privileges. The Maynards seek only to be free from prosecutions for future violations of the same statutes. *Younger* does not bar federal jurisdiction.

Wooley v. Maynard, 430 U.S. 705, 711, 97 S.Ct. 1428, 1433, 51 L.Ed.2d 752 (1977). It scarcely needs repeating that in all those respects which the Court found significant, our case is the same as *Wooley*. The plaintiffs do not seek to collaterally attack their convictions either by annulment or by expunging their criminal records. All they seek is prospective relief against future prosecutions under the same statute. Under these circumstances, we are compelled to conclude that, absent a pending state proceeding, *Younger* abstention is not required.

As a matter of policy, this is also the appropriate result. With the contrary result, for which defendants

contend, a person who has failed to raise a potential constitutional claim in a state criminal proceeding but has instead pleaded guilty and served his sentence will forever be precluded from raising that same constitutional challenge in an entirely new cause of action before a federal court. By reaching and barring entirely new causes of action, the effect of defendants' contention would be to infuse abstention with a power which even res judicata does not possess. In addition, the defendant's principle would sap most of the vitality from § 1983, the primary bulwark of citizens' rights against state abuses. Frankly, we do not believe that the doctrine of abstention is intended to have such far-reaching effects. Thus, as a matter of policy as well, we decline to depart from the clear holding of *Wooley*.

Ripeness of the Case or Controversy

Defendants next assert that plaintiffs' attack on the Illinois Residential Picketing Statute is based on enough future contingencies that it is not ripe for present judicial determination. The test of ripeness has been established for over a generation: "Basically, the question in each case is whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). The doctrine has encountered its most sophisticated application in the area of First Amendment rights where a failure to find a ripe controversy means that plaintiff can challenge the statute only after his arrest, a result which could likely have a chilling effect on plaintiff's assertion of his alleged rights. In the words of Justice Brennan, "a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding."

Steffel v. Thompson, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974).

There have been several Supreme Court cases in the last decade which offer guidance in determining the degree of ripeness required of a plaintiff seeking to vindicate his First Amendment rights in an action for declaratory judgment. For the most part, these cases have concentrated on two types of conduct which, individually or taken together, indicate a "ripe" controversy: actual prosecution of plaintiffs or threatened prosecution of plaintiffs. In *Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971), a group of Negroes challenged the constitutionality of the Illinois statutes prohibiting mob action, resisting arrest, aggravated assault, aggravated battery, and intimidation. According to the complaint, plaintiffs had been either arrested or threatened with arrest for violating one or more of the challenged statutes. *Id.* at 78, 91 S.Ct. 758. A three-judge court upheld all but the mob action and intimidation statutes and found one section of each statute unconstitutionally overbroad. The Supreme Court reversed, holding that the validity of these statutes was not ripe for judicial determination. The Court noted:

> Not a single one of the citizens who brought this action had ever been prosecuted, charged, or even arrested under the particular intimidation statute which the court below held unconstitutional. . . . In fact, the complaint contains no mention of any specific threat by any officer or official of Chicago, Cook County, or the State of Illinois to arrest or prosecute any one or more of the plaintiffs under that statute either one time or many times.

Id. at 80-81, 91 S.Ct. at 760. Thus, prosecutions or threats of prosecution under one statute cannot supply the necessary immediacy to create a ripe controversy over the applicaton of another statute under which no prosecutions or threats of prosecution have been made. In another case that term, the Court affirmed that, at a minimum, a genuine threat of prosecution was necessary to establish ripeness:

> But here appellees . . . do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or that a prosecution is remotely possible. They claim the right to bring this suit solely because, in the language of their complaint, they 'feel inhibited.' . . . persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs. . . .

Younger v. Harris, 401 U.S. 37, 42, 91 S.Ct. 746, 749, 27 L.Ed.2d 669 (1971). At the other extreme of the ripeness issue is the recent case of *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). In that case, plaintiffs had been arrested, tried, and convicted on three separate occasions for violating the New Hampshire statute which prohibited the covering of any part of an automobile license plate. Following their third state court conviction in less than five weeks, plaintiffs filed a § 1983 action in federal court for declaratory and injunctive relief against future state prosecutions. Given the state record of actual prior prosecution, the Court had little difficulty in finding the controversy ripe. *Id.* at 712, 97 S.Ct. 1428.

Between the extreme of no prior prosecution or no threat of prosecution and that of three successful prosecutions in less than five weeks are a trilogy of Supreme Court cases. In *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977), the plaintiffs were challenging, as a denial of due process, the imposition of a state contempt order issued during supplementary proceedings which had been initiated to collect a judgment. All but two of the plaintiffs had been released from jail after payment of their fines. Finding that "the complaint does not allege, and . . . the District Court did not find, that these appellees were threatened with further or repeated proceedings," the Supreme Court held that there no longer existed a live controversy between these plaintiffs and the State of New York. 430 U.S. at 332-33, 97 S.Ct. at 1216. In the converse situation, however, where no actual prosecution had ever been undertaken against the

plaintiff, the Supreme Court found that the threats of enforcement were sufficient to create a live controversy. *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). In *Steffel*, a group of Vietnam protestors of which plaintiff was a member had previously been threatened with arrest if they continued handbilling at a shopping center. After the first threat, the group dispersed. On a second occasion, plaintiff and a companion returned to the shopping center and continued handbilling. They were again threatened with arrest. Plaintiff left, but his companion stayed and was subsequently arrested. Plaintiff then brought a § 1983 suit in federal court, seeking declaratory and injunctive relief against future prosecutions for handbilling. At a hearing before the district court, the defendants stipulated that if plaintiff returned to the shopping center and continued handbilling, he would be arrested under the challenged state statute. The Supreme Court held that the threats of prosecution were genuine rather than "imaginary or speculative" and held that although plaintiff had never actually been arrested, "the prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been 'chimerical.' " 415 U.S. at 459, 94 S.Ct. at 1215. Under these circumstances, the Supreme Court found a controversy sufficiently ripe to grant declaratory relief.

Unlike *Steffel*, the defendants in our case have not stipulated that plaintiffs would certainly be arrested under the Illinois statute for future picketing. Thus, our case most nearly resembles the third case in the Supreme Court trilogy, *Ellis v. Dyson*, 421 U.S. 426, 95 S.Ct. 1691, 44 L.Ed.2d 274 (1975). In that case, plaintiffs were arrested under the Dallas loitering statute. Rather than challenging the constitutionality of the loitering statute in their state prosecution, plaintiffs pleaded nolo contendere and subsequently sought declaratory and injunctive relief in federal court against future state prosecutions. Relying on a Fifth Circuit decision (459 F.2d 919) which was reversed in *Steffel*, the district court denied all relief. The Supreme Court reversed and

remanded for the district court "to determine the actual existence of a genuine threat of prosecution, or to inquire into the relationship between the past prosecution and the threat of prosecutions for similar activity in the future." 421 U.S. at 433, 95 S.Ct. at 1695. In dicta, the Court expressed strong doubts about the continuing "liveness" of the controversy for two reasons. First, counsel for the plaintiffs were unaware of plaintiffs' whereabouts and had not heard from them in over a year. Second, the Court was uncertain from the record, whether, under the current pattern of enforcement, plaintiffs would likely be arrested for similar conduct. 421 U.S. at 434, 95 S.Ct. 1691.

We believe that the case before us, although a close one, presents a "live" or "ripe" controversy within the meaning of these Supreme Court precedents. In making this determination on a request for declaratory relief, we must assess two probabilities: the likelihood that plaintiffs will engage in allegedly protected conduct, and the likelihood that defendants will arrest plaintiffs under the Illinois Residential Picketing Statute.[3] As to the first factor, the plaintiffs have made a strong and undisputed showing. The plaintiffs have submitted five affidavits averring that because of the Mayor's failure to take a stand on busing since their last picket, plaintiffs strongly desire to picket the Mayor's home at or near the beginning of the school year and to urge him to support publicly the busing of Chicago school children. (Affidavit of Vivian Buckhoy, par. 7; Affidavit of Joan Raisner, par. 4; Affidavit of David Smith, par. 5; Affidavit of Finley Campbell, par. 6; Affidavit of Roy Brown, par. 7). According to the most recent affidavit, the Committee Against Racism, of which all the plaintiffs are members, has formalized this intention in a resolution.

[3] In formulating a framework for analyzing the ripeness of a controversy, Justice Powell emphasized two similar factors. *Ellis v. Dyson*, 421 U.S. 426, 443, 95 S.Ct. 1691, 44 L.Ed.2d 274 (1975) (J. Powell, dissenting).

The Committee has voted unanimously to picket Mayor Bilandic's house at or near the beginning of the school year, if the threat of arrest under the Illinois statute is removed. (Affidavit of Vicki Campbell, par. 3). Incontrovertibly, these affidavits demonstrate an intent, actually a group commitment, to picket the Mayor's home, and the strength of this intent greatly increases the likelihood that, absent threats of arrest and prosecution, plaintiffs will actually engage in allegedly protected activity during the month of September 1978. It is the manifest presence of this intent which distinguishes our case from that of *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed. 2d 376 (1977). In *Juidice*, certain of the plaintiffs had been held in contempt for failing to appear at a proceeding in which a judgment against them was sought to be enforced. By the time of the federal trial challenging the constitutionality of the contempt procedures, these plaintiffs had already completed their sentences and paid their fines. There was no allegation of a reasonable likelihood that these plaintiffs would, in the future, refuse to pay their just debts, have judgment entered against them, and then risk contempt by refusing to attend proceedings to enforce that judgment. Understandably, there was also no allegation that these plaintiffs intended to engage in such a highly contingent course of conduct.[4] With little or no likelihood that these plaintiffs would prospectively be subjected to this allegedly unconstitutional procedure, the Supreme Court found that these plaintiffs' controversy with the state was not "ripe." Here, however, the plaintiffs intend, and their organization has unanimously committed itself, to engage forthwith in the picketing of Mayor Bilandic's home. If there is any lack of "ripeness" in this case, it does not result from the

[4] The contingent nature of a future contempt proceeding stems from both the substantial number of events which must occur and the slight probability of the individual events.

improbability of plaintiffs engaging in allegedly protected activity.[5]

We turn then to the second factor for our consideration, the likelihood of defendants arresting plaintiffs for future picketing of the Mayor's house. Defendants have observed that, unlike *Steffel*, there is no allegation that defendants have threatened to arrest and prosecute plaintiffs under the Illinois Residential Picketing Statute. Although this failure does take our case outside of the precise *Steffel* facts, we do not regard the absence of threatened prosecution as dispositive. In *Ellis v. Dyson*, the Court advised that, in assessing whether there existed a "credible threat" of arrest,[6] the district court may "inquire into the relationship between the past prosecution and the threat of prosecutions for similar activity in the future." 421 U.S. at 433, 95 S.Ct. at 1695. In our case, the relationship between the past prosecution of plaintiffs and their future prosecution is direct and clear. As plaintiffs' affidavits establish, plaintiffs intend to engage in precisely the same conduct as that for which some of them were previously arrested. Plaintiffs in our case are members of the same organization as the prior arrestees; they are seeking to protest the same political issue, the Mayor's failure to support busing; they intend to picket the home of the same public official, Mayor Bilandic; they even intend to picket at the same time of the year, the beginning of

[5] At the hearing on this question, one of defendants' attorneys argued that Mayor Bilandic's refusal to take a stand on busing, the cause for plaintiffs' picketing, is a political decision and that his adherence to this political decision is "purely speculative." Counsel, however, offered no reason why, after 11 months and considerable publicity about the Mayor's busing position, he might reverse his political decision. As far as we are informed, reversal of the Mayor's decision is more a hope than an expectation. Political decisions are notoriously subject to change, and if the mere possibility of change were the test, it is difficult to see how any case of this kind could ever be ripe.

[6] We think the Supreme Court's "credible threat" of arrest and our "likelihood" of arrest refer to the same factor.

school.[7] Clearly, "the challenged statute applied particularly and unambiguously to the activities in which the plaintiff[s] engaged or sought to engage." *Ellis v. Dyson*, 421 U.S. 426, 447, 95 S.Ct. 1691, 1702, 44 L.Ed.2d 274 (1975) (Powell, J., dissenting). By arresting some of plaintiffs under the Illinois Residential Picketing Statute on the prior occasion, the defendants indicated their belief in the constitutionality of the statute. *See* 13 C. Wright, E. Cooper & A. Miller, *Federal Practice and Procedure:* Civil § 3532, p. 255 (1975). In their appearances before this court, the defendants have indicated they persist in this belief. Given the virtually exact similarity between plaintiffs' past and proposed conduct and the defendants' continuing belief in the constitutionality of the Illinois Residential Picketing Statute, it appears extremely unlikely that the Chicago police would not use what they regard as a valid law to protect the Mayor against plaintiffs' intended picketing at his home.[8] Thus, there

[7] This high degree of similarity between past and future conduct is one ground for distinguishing *Ellis v. Dyson*. In *Ellis*, plaintiffs were arrested at 2 a. m. in their car and charged with loitering. As their ground for invoking declaratory relief, plaintiffs alleged that their prior arrest had the chilling effect of inhibiting their freedom of movement. *Ellis v. Dyson*, 358 F.Supp. 262, 264 (N.D.Tex.1973). They did not specify what future conduct was inhibited. Thus, it could not be determined whether their future conduct "unambiguously" fell within the statute. 421 U.S. at 447, 95 S.Ct. 1691 (Powell, J., dissenting). Equally important, since the similarity between plaintiffs' past and future conduct could not be determined from the complaint, arrest for plaintiffs' past conduct could not supply any reliable evidence as to the likelihood of arrest for plaintiffs' future conduct.

[8] In determining the "liveness" of a controversy, it is proper and on occasion even necessary to consider the political climate. In *Steffel*, the Court remanded with this instruction: "Since we cannot ignore the recent developments reducing the Nation's involvement in that part of the world [Vietnam], it will be for the District Court on remand to determine if subsequent events have so altered petitioner's desire to engage in handbilling . . . that it can no longer be said that this case

(Footnote continued on following page)

exists a reasonable likelihood, or "credible threat," that defendants would arrest plaintiffs for their intended picketing. Since both factors have been satisfied in this case, we hold that plaintiffs have a "live" controversy with defendants over the constitutionality of the Illinois Residential Picketing Statute.

The Merits

The Illinois Residential Picketing Statute provides:

> It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.

Ill.Rev.Stat. ch. 38, § 21.1-2. Plaintiffs have resolved to picket peacefully on the sidewalk in front of Mayor Bilandic's home as a protest against the Mayor's failure to take a public stand in favor of busing, but have failed to undertake their intended picketing because of the probable enforcement of this criminal statute. Picketing, of course, is an activity which often expresses a political or social viewpoint and which is thus entitled to First Amendment protection in many instances. "We have emphasized before this that 'the First and Fourteenth Amendments [do not] afford the same kind of freedom to

[8] *continued*
presents 'a substantial controversy . . . .' " Of course, the political climate can affect the likelihood of defendants' enforcement as well as the likelihood of plaintiffs' intent to engage in the allegedly protected activity. In our case, for example, it is not insignificant that the residence plaintiffs seek to picket is that of the Mayor rather than that of some citizen whose privacy may be of lesser concern to the Chicago police.

those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech," *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152, 89 S.Ct. 935, 939, 22 L.Ed.2d 162 (1969) (citations omitted). Thus, "the conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association," *Cox v. Louisiana*, 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed.2d 487 (1965), provided the regulation is reasonable as to time, place, and manner. The defendants argue that the statute's prohibition on picketing a residence is a reasonable regulation on the place where First Amendment activity may occur. Plaintiffs have attacked the statute as void for vagueness, overbroad, and a denial of equal protection.

Void for Vagueness

Prosecution under a statue may violate due process of law when the statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). There are several dangers in such a statute. A vague statute does not provide a person with sufficient warning of the conduct proscribed by the criminal law and may thus lay a trap for the innocent. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). When such a statute implicates conduct which is conceivably protected by the First Amendment, uncertain meanings lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked," *Id.* at 109, 92 S.Ct. at 2299, and may thus inhibit citizens from engaging in protected First Amendment activity. In addition, a vague law, by delegating basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, invites

arbitrary and discriminatory enforcement. *Id.* at 108-09, 92 S.Ct. 2294. Because of these grave dangers, a person may challenge a criminal statute either as vague on its face or vague as applied. In this case, plaintiffs have challenged phrases in the residential picketing statute on the ground of vagueness.

Three of the phrases challenged by plaintiffs define the statute's several exceptions. They are: "residence or dwelling is used as a place of business," "a place of employment involved in a labor dispute," and "the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest." Plaintiffs do not contend that the picketing they contemplate will occur at one of the places enumerated in these three exceptions.[9] In a real sense then, there exists no live controversy between plaintiffs and defendants over the application of these exceptions, and plaintiffs lack standing to challenge these exceptions. Despite the clear absence of a live controversy or standing with respect to the statute's exceptions, plaintiffs ask that the exceptions be declared void on their face. Although the preferred position of First Amendment rights may impel a court to entertain a facial challenge at the behest of one who has not been injured by the challenged portions of the statute, a declaration of facial invalidity, even under those circumstances, is "manifestly, strong medicine" and a narrow "exception to our traditional rules of practice." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973). On their face, each of these exceptions reasonably identifies the location where residential picketing may lawfully take place. Although there may be some imaginable instances in which the application of these exceptions, and especially the third,

[9] In their reply brief, plaintiffs raise the possibility that Mayor Bilandic's home is a place "commonly used to discuss subjects of general public interest," but they do not further explain. Consequently, we take this to be another one of the hypotheticals used to illustrate plaintiffs' vagueness arguments.

may not be altogether predictable, "the difficulty of determining whether certain marginal cases are within the meaning of . . . a challenged criminal statute does not automatically render that statute unconstitutional for indefiniteness." *United States v. Baranski*, 484 F.2d 556, 562 (7th Cir. 1973) (citations omitted). A declaration of facial invalidity is singularly inappropriate where the residual vagueness giving rise to such marginal cases is susceptible to a limiting construction, 413 U.S. at 613, 93 S.Ct. 2908. When and if a person with standing is prosecuted in one of these marginal cases, the state courts may narrowly construe the exceptions to cure any residual vagueness and thereby prevent an unconstitutional application of the statute. Since the exceptions reasonably identify the locations where residential picketing is permitted and residual vagueness is certainly susceptible to a narrowing construction, we decline to administer the stronger medicine and to declare the exceptions facially void for vagueness.[10]

Plaintiffs also argue that the words "residence or dwelling," "before or about," and "picket" are impermissibly vague. Plaintiffs propose to walk back and forth on the public sidewalk in front of Mayor Bilandic's Bridgeport home, carrying placards which protest his failure to support school busing. As applied to this proposed conduct, the statute is not impermissibly vague. Without much doubt, "picketing" unambiguously describes the activity of a person who walks back and forth in front of a building, carrying placards which protest the inhabitant's conduct.[11] Just as unambig-

[10] Plaintiffs argue that the proper manner to determine the vagueness of a term or phrase is by posing hypothetical questions. This approach, however, does not accord with the current approach to analyzing vagueness adopted by the Supreme Court or Seventh Circuit. *E.g., Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); *United States v. Baranski*, 484 F.2d 556, 562 (7th Cir. 1973).

[11] Throughout the preliminary hearing, plaintiffs' counsel continually referred to plaintiffs' intended activity as "picketing," and, before we suggested that there might be a

(Footnote continued on following page)

uously, "before or about" includes, to someone of common understanding, the sidewalk which runs in front of a house. As for "residence or dwelling," by plaintiffs' own admission, the structure at 3238 South Union is the "residence" of Mayor Bilandic. (Complaint, par. 6). Thus, we believe that a person of ordinary understanding would easily comprehend that the Illinois Residential Picketing Statute clearly applies to plaintiffs' contemplated conduct. The question then becomes whether any of these terms is so vague that the statute should be declared void on its face. We do not think so. "Residence" and "dwelling" are terms regularly used in burglary statutes without resulting in fatal vagueness. *See generally,* Ill.Rev.Stat. ch. 38, § 19-1. On several occasions, the term "residence" has appeared in a statute before the Supreme Court but has not been challenged for vagueness. *E. g., Martin v. Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); *Breard v. City of Alexandria,* 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951). Although some nice questions have arisen as to the meaning of "dwelling" and "residence" in the definition of burglary, for example, these terms are easily comprehended by laymen. Neither word unnecessarily leaves arrest or conviction to the subjective judgment of policemen, judges, or juries. The same is true of the word "picketing." Due, in large part, to the publicity attending labor and civil rights activism, the average man has a definite understanding of the type of conduct prohibited by the term "picketing." In legal parlance, the term has achieved a well-established meaning so that judges and juries asked to try a "picketer" will determine the outcome on the basis of explicit standards rather than subjective attitudes. *See generally,* Kamin, *Residential Picketing and the First Amendment,* 61 Nw.U.L.Rev. 167 (1966). Moreover, we

[11] *continued*
vagueness argument about the term, were seeking certification of a class of persons who intended to "picket" on public property in violation of the Illinois Residential Picketing Statute.

think it not insignificant that, of the many statutes prohibiting "picketing" which have been considered by the Supreme Court, no challenger has ever attempted to argue that the term "picketing" was facially vague. *E.g., Cox v. Louisiana,* 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); *Cameron v. Johnson,* 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968). Thus, we do not find the term "picketing" void for vagueness. The plaintiffs' third challenge is to the words "before or about." Like the term "near," there is some lack of specificity in this phrase. *Cox v. Louisiana,* 379 U.S. 559, 568, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965). This, however, does not render the phrase unconstitutionally vague. In several instances, the Supreme Court has upheld terms denoting proximity against a vagueness attack. *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (statute prohibits noise-making by a person on private or public grounds "adjacent" to a school); *Cox v. Louisiana,* 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) (statute prohibits picketing or parading "near" a courthouse). *See also, Cameron v. Johnson,* 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968). We do not believe that the phrase "before or about" can be distinguished from the terms "adjacent" or "near" on any principled basis. Moreover, we believe that the phrase "before or about" gives fair warning to the person of common understanding at what place his conduct is prohibited. Thus, none of the three terms is facially vague. In so concluding, we do not mean to suggest that there may not be situations in which the application of these terms may be difficult and somewhat unclear. When and if those situations arise, there will be time enough for a state or federal court to determine that the statute is vague as applied and to construe the statute narrowly enough to protect constitutional conduct.

Overbreadth

In September 1977, several members of the Committee Against Racism were arrested and convicted under the Illinois Residential Picketing Statute for

picketing on the sidewalk in front of Mayor Bilandic's home. According to the affidavits submitted on this motion for summary judgment, these Committee members and several of their colleagues intend to picket once again on the sidewalk in front of Mayor Bilandic's home, but they fear renewed prosecution under the Illinois Residential Picketing Statute. Plaintiffs contend that the statute absolutely prohibits them from peacefully picketing on public sidewalks and that it is therefore overbroad as applied. *State v. Schuller*, 280 Md. 305, 372 A.2d 1076 (1977). Defendants respond that the statute is a reasonable regulation of the place where picketing may occur, which is intended to promote the legitimate state interest of protecting the privacy and tranquility of its citizens' homes. *City of Wauwatosa v. King*, 49 Wis.2d 398, 182 N.W.2d 530 (1971).

During the last generation, the Supreme Court has considered several cases "pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors" and has developed certain principles for resolving the conflict of these two fundamental interests. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208, 95 S.Ct. 2268, 2272, 45 L.Ed.2d 125 (1975).

> A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.

Id. at 209, 95 S.Ct. at 2272 (citations omitted).[12] In essence, a court must look to the nature of the forum at which the plaintiffs propose to picket and then must strike a balance between the First Amendment rights of the speakers and the privacy interests of their audience.

The nature of the sidewalks as a public forum has been an established principle in First Amendment law for over a generation:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. . . . The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, . . .; but it must not, in the guise of regulation, be abridged or denied.

Hague v. CIO, 307 U.S. 496, 515-16, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939). Although the public nature of the sidewalks is the paramount and dispositive consideration in many instances where the surrounding area has also been dedicated to public use, Justice Roberts' broad rule has encountered several limitations when the sidewalks are contained within or directly adjoin private property. The Court has clearly held that a state may prohibit, under its trespass laws, all picketing on a sidewalk which is located on an individual's private property or on state property which has not been dedicated to public use. *Lloyd v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972) (owner may constitutionally prohibit handbilling on the sidewalks of shopping center when

[12] With the possible exception for labor activity discussed under equal protection, the Illinois Residential Picketing Statute is neutral as to content.

the subject of the handbilling, Vietnam, is unrelated to the shopping center's use and when the handbillers had adequate alternative means of communicating their protest);[13] *Adderley v. Florida*, 385 U.S. 39, 41, 87 S.Ct. 242, 17 L.Ed.2d 149 (state may constitutionally prohibit picketing on the sidewalks and driveway of the county jail when sidewalks are within the jail compound and have not been dedicated to public use). The Court has also held that, even though the sidewalks surround a state or municipal building which has been dedicated to public use, the state may prohibit certain forms of expressive conduct which interfere with the building's intended use. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (under an anti-noise ordinance, city may constitutionally prohibit a demonstration on the sidewalks adjacent to a school when that demonstration disturbs the peace and good order of the classroom); *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) (state may constitutionally prohibit demonstrations on sidewalks near a courthouse when the demonstration is intended to obstruct justice); *see also, Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (city may constitutionally prohibit the use of sound trucks which emit loud and raucous noises on the public streets). In our case, the forum plaintiffs seek to use is the sidewalk in front of the Mayor's residence. This forum does not adjoin a building or area dedicated to public use and hence does not fall within the core of the *Hague* principle. Rather, the sidewalk, admittedly public in nature, borders on property which is incontrovertibly private in nature. *See Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974). We believe that the sidewalk in this instance falls within the category of fora in which expressive conduct may be prohibited by a

[13] This case was decided on the theory that the conduct of the shopping center owner was state action under the Fourteenth Amendment theory which was explicitly overruled four years later. *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976). *Lloyd*, however, still stands for the principle that a state may protect a citizen from picketing on sidewalks owned by him.

narrowly drawn statute if that conduct is inconsistent with the intended use of the surrounding area. Since there exists no absolute right to picket on residential sidewalks, the constitutionality of this statute thus turns on a balancing of the plaintiffs' and defendants' respective interests.

The plaintiffs are seeking to picket in favor of a political viewpoint about one of the most controversial topics in local government: the busing of school children to achieve integrated schools. Without a doubt, plaintiffs' picketing is an expression which is well within the protection of the First Amendment. As a result, plaintiffs' picketing cannot be flatly prohibited at all times and all places. The Illinois statute, however, only prohibits picketing in one particular place, "before or about" a residence, and does not bar picketing at any other appropriate place. During the preliminary hearing, defendants maintained that the Illinois Residential Picketing Statute leaves plaintiffs free to picket the Mayor on the busing issue in an alternative forum, such as City Hall, and plaintiffs did not dispute that this alternative forum exists. It is clear, therefore, that the Illinois statute does not stifle plaintiffs' expressive activity but merely prohibits it in certain places. The question then becomes whether there is something inherent in the residential forum which makes the City Hall forum significantly less meaningful. We do not believe that the City Hall alternative is less meaningful or less reasonable as a forum for plaintiffs' picketing. When faced with a similar choice of alternative fora in *Lloyd*, the Court relied heavily on whether the purpose of the expressive conduct is directly related to the use of the adjoining property. *Lloyd v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972); *Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974). Plaintiffs' purpose in this case is to urge Mayor Bilandic to take a public stand on a controversial political issue. It is difficult to perceive any direct relaiton between the Mayor's public, political stand and the use of the Mayor's home, and plaintiffs do not appear to argue that such a relation exists. City

Hall, on the other hand, is a forum whose primary uses include the transaction of public business and the decision of controversial political issues; plaintiffs' picketing appears to relate directly to the intended uses of City Hall. In terms of the plaintiffs' purpose then, City Hall is a more meaningful forum than the Mayor's home. There are only two conceivable advantages which the residential forum may offer over City Hall. The plaintiffs feel by picketing the Mayor's home rather than his office, they will obtain greater news coverage for their views. Since the content of plaintiffs' picketing would be the same in either forum, any potentially expanded publicity would appear to result from the perceived inappropriateness of the residential forum and from the potential that the Mayor might respond negatively to the disruption of his home life. *See generally*, Note, *Picketing the Homes of Public Officials*, 34 U.Chi.L.Rev. 106 (1966). A second conceivable advantage is that the picketing of the Mayor's home may make a more forceful impression upon him. This advantage, too, appears to result from the perceived inappropriateness of the residential forum; it may also result from the greater likelihood of intimidation inherent in group patrolling of the family residence. *Id.* Both of these advantages stem from the prohibitable aspects of plaintiffs' conduct, and neither of the advantages is so significant as to make City Hall a substantially less meaningful forum for the legitimate expression of plaintiffs' views. Thus, although plaintiffs have a First Amendment right to picket the Mayor as a protest over his stand on busing, the plaintiffs have in City Hall a reasonable, meaningful, and indeed more appropriate forum for exercising their First Amendment rights and communicating to the Mayor. *Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974). The existence of an alternative forum, however, is not dispositive of the constitutional question for unless there is a valid and narrowly served state interest supporting the prohibition, plaintiffs should be free to choose among fora.

Against plaintiffs' First Amendment rights then, we must balance the interests which the Illinois Residential Picketing Statute is intended to serve. The legislative finding clearly identifies the state's interests:

> The Legislature finds and declares that men in a free society have the right to quiet enjoyment of their homes; that the stability of community and family life cannot be maintained unless the right to privacy and a sense of security and peace in the home are respected and encouraged; that residential picketing, however just the cause inspiring it, disrupts home, family and communal life. . . .

Ill.Rev.Stat. ch. 38, § 21.1-1.[14] The state's interest in enacting this statute is to protect the privacy and tranquility of a citizen's home. In First Amendment terminology, the statute attempts to protect a citizen from becoming a captive audience in his own home.

On several occasions, the Supreme Court has considered whether the state's interest in protecting a captive audience outweighs a speaker's interest in communicating his thoughts. In the earliest case posing this conflict, the Supreme Court struck down an ordinance which completely prohibited any person from summoning an occupant to his door for the purpose of distributing handbills or circulars. *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943). Sensitive to the homeowner who desired to receive the handbiller's message, the Court reasoned that the unwilling or captive home occupant had within his control a simple and unburdensome means of protecting

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[14] Unquestionably, this statute, in its attempt to protect the health and security of its citizens, is a legitimate exercise of the state's police power. *See generally, Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). This is emphatically so, since "the police power of a state extends beyond health, morals and safety, and comprehends the duty, . . . to protect the well-being and tranquility of a community." *Kovacs v. Cooper*, 336 U.S. 77, 83, 69 S.Ct. 448, 451, 93 L.Ed. 513 (1949).

himself: posting a sign barring solicitors. *Id.* at 147-49, 63 S.Ct. 862. In a subsequent case, the Court struck the balance in favor of the home occupant's privacy, upholding an ordinance which prohibited solicitors from entering the premises of a residence without the occupant's consent. *Breard v. City of Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951). Although moved in significant part by the distinction between religious or political and commercial speech, the Court based its holding on the access the solicitors could still maintain through reasonable alternative means of communication. *Id.* at 644, 71 S.Ct. 920.[15] More recently, the Court has again favored the occupant's privacy by upholding a federal statute which permitted a homeowner, who has received mail he believes to be sexually provocative or erotically arousing, to request that the Post Office direct the sender to refrain from future mailings to that homeowner. *Rowan v. United States Post Office Department*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970). In some of the Court's strongest language on the subject, the Chief Justice recognized that

> Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; . . . . The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality. . . . . That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.

Id. at 737-38, 90 S.Ct. at 1490-91; *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974); *Collin v. Smith*, 578 F.2d 1197 at 1206 (7th Cir. 1978).

In our case, we also believe that the balance favors the captive homeowner. Without question, home is a unique

[15] We have already considered the alternative means of communication available to the plaintiffs in an earlier section of this opinion.

sanctuary whose benefits are no less numerous or necessary for being intangible. Justice Black has most eloquently underscored these unique attributes of a person's home. It is "the sacred retreat to which families repair for their privacy and their daily way of living," "sometimes the last citadel of the tired, the weary, and the sick," wherein people "can escape the hurly-burly of the outside business and political world." *Gregory v. City of Chicago*, 394 U.S. 111, 125, 118, 89 S.Ct. 946, 954, 950, 22 L.Ed.2d 134 (1969) (Black, J., concurring). For the person of average means, there is no alternative; home is the final place of retreat. If he is made captive there, he is a captive everywhere. Naturally, the homeowner may be subjected to certain inconveniences, like the sign posting in *Martin*, in order to preserve these characteristics for his home. What is significant in our case, however, is that such simple expedients are not likely to protect the homeowner. Mayor Bilandic may walk out onto his lawn and ask the plaintiffs to cease their picketing, but it would defeat the picketers' avowed purposes if they were to honor such a request. Absent the picketers' voluntary accession to the Mayor's request, the Mayor's only alternative means of protecting his home is through legal prosecution. This, too, may prove ineffective. Since, unlike *Martin*, *Breard*, or *Rowan*, the picketers intend to confine their activity to the public sidewalk, they cannot be prosecuted for trespass. If plaintiffs are peaceful, they cannot be prosecuted for disorderly conduct or breach of the peace. Even if the picketers do cause a disturbance, the breadth of such statutes renders them an uncertain and chinked protection at best. *See Gregory v. City of Chicago*, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969). Moreover, the homeowner is made captive and his tranquility seriously invaded well before he can successfully resort to prosecution under breach of the peace or disorderly conduct statutes.[16] Thus, when the state does not protect

[16] In some instances, the homeowner may have a tort remedy for nuisance or invasion of privacy. These, too, offer uncertain relief. *See* 34 U.Chi.L.Rev. 106, 127-30 (1966). Perhaps more

(Footnote continued on following page)

the homeowner with a residential picketing statute, he does not have an alternative means of protection, either through self-help or through legal process, to which he can easily turn. Compared to the picketers, who have in City Hall a meaningful and easily accessible alternative forum for communication of their views, the homeowner has no alternative means of preserving the privacy of his home. We therefore conclude that the balance favors the privacy interests of the homeowner and against the free speech interests of the picketers.

Plaintiffs contend that although the state may reasonably regulate picketing as to time, place, and manner by means of a narrowly drawn statute, the state may not flatly prohibit picketing in a particular place. The Illinois Residential Picketing Statute, they maintain, is not a statute narrowly tailored to the purposes of the legislature. We do not agree. The purpose of the Illinois legislature in enacting this statute is to preserve the peace and tranquility of a person's home, and "residential picketing," the legislature has found, "however just the cause inspiring it, disrupts home, family and communal life." Ill.Rev.Stat. ch. 38, § 21.1-1. This legislative finding, although general, is a reasonable evaluation of picketing's effects. The nature of picketing, with its persistent marching and patrolling, is inimical to the homeowner's peace of mind and often intimidates the homeowner and his family. An official who, by virtue of his running for office, is willing to confront picketing protestors at his office or at a rally may nonetheless be intimidated by those very same protestors picketing in substantial numbers near his family. By

[16] *continued*
to the point, the state should not be confined to the categories of common law torts in defining the kind of activity from which a homeowner may be protected. *See generally, Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (political advertisement need not be misleading). It is well within the state's police power to protect a captive audience from First Amendment conduct which has not risen to the level of a tort.

patrolling the official at his home, the picketers are annoying the official and his family and, indeed, are intending to annoy them. The prohibition of all picketing in this location is the only way for the legislature to achieve its purpose of reserving to the homeowner a sense of tranquility, security, and privacy. On this point, we are in complete agreement with the Supreme Court of Wisconsin:

> Tranquility and privacy are fragile enough flowers, particularly in a home setting. . . . Putting aside the not necessarily unreasonable fear of escalation . . . the very fact of physical patrolling and marching by the group of uninvited and unwelcome paraders creates pressure. The newsworthiness of the situation stems in part from the tensions created and pressures focused on the home. Such tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility. If, as we have said, it is a proper public purpose to protect both privacy and tranquility, then the prohibiting of picketing before or about the home is a clearly related and entirely reasonable means to such an end.

City of Wauwatosa v. King, 49 Wis.2d 398, 182 N.W.2d 530, 537 (1971). We therefore conclude that the Illinois Residential Picketing Statute, as applied to plaintiffs' intended conduct, is a narrowly drawn measure for achieving the state's purpose of protecting the privacy and tranquility of the home.

Plaintiffs also argue that the Illinois Residential Picketing Statute is overbroad on its face. The Supreme Court has clearly defined the limited occasion on which a court should entertain a facial overbreadth challenge to a statute which is constitutional as applied: "To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's

plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 2918, 37 L.Ed.2d 830 (1973). We have just held that the Illinois statute may legitimately prohibit picketing on the sidewalk in front of Mayor Bilandic's home. Although at the preliminary hearing, we expressed some misgivings about the breadth of the phrase "before or about" and posed some hypotheticals which illustrated our misgivings, we are not able to conclude that the statute's potential overbreadth is so real and substantial as to justify a holding of facial unconstitutionality. In our view, the statute will most often be applied in the narrow case of picketing on sidewalks in front or alongside of a residence. The possiblity of an application to picketers on a neighbor's property or in a public park seems fairly remote. In any event, should one of these possibilities actually eventuate, we are confident that any "real," overbroad application of the statute can be cured by a state or federal court's narrowing construction. *Id.* at 613, 93 S.Ct. 2908. Therefore, we conclude that the Illinois Residential Picketing Statute is not facially overbroad. *See also, Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).[17]

Equal Protection

As their final argument, plaintiffs assert that the statutory exemption granted to labor picketing violates the Fourteenth Amendment's guarantee of equal protection. The Illinois Residential Picketing Statute provides: "It is unlawful to picket before or about the residence or dwelling of any person, . . . However, this Article does not . . . prohibit the peaceful picketing of a place of employment involved in a labor dispute . . . ." Ill.Rev.Stat. ch. 38, § 21.1-2. Plaintiffs argue that the

[17] Unlike the City of Jacksonville in *Erznoznik*, the State of Illinois and City of Chicago admit that the Illinois Residential Picketing Statute may be susceptible to possible overbroad application.

statute classifies picketing on the basis of its content and that such a classification burdens exercise of the fundamental rights embodied in the First Amendment but is not supported by the compelling state interest. In support of their argument, plaintiffs rely on *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). In *Mosley*, a retired postal worker had peacefully picketed a Chicago high school for seven months, protesting the school's racially discriminatory policies. During this time, the City of Chicago passed a disorderly conduct ordinance which prohibited a person from picketing or demonstrating "on a public way within 150 feet of any primary or secondary school building while the school is in session . . . provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute.' " *Id.* at 93, 92 S.Ct. at 2288. The effect of the ordinance, the Court observed, was to prohibit peaceful picketing which protested the school's racially discriminatory policies but to permit peaceful picketing which protested the school's labor policies. Thus, "the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation 'thus slip[s] from the neutrality of time, place, and circumstance into a concern about content.' This is never permitted." *Id.* at 99, 92 S.Ct. at 2292; *cf. Young v. American Mini Theatres*, 427 U.S. 50, 65-66, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). Finding that the compelling state interest of preventing disruption in the schools did not support the classification made by the ordinance, the Court held the ordinance unconstitutional. *Id.*, 408 U.S. at 102, 92 S.Ct. 2286.

There are two possible classifications which plaintiffs may be attempting to challenge: the classification between picketing a residence and picketing a place of employment and the classification between picketing a place of employment where a labor dispute exists and one where no labor dispute exists. Although the

plaintiffs clearly have standing to challenge the first classification, it is distinguishable from *Mosley*. In *Mosley*, both the plaintiff and any labor picketers would be picketing in the same place: within 150 feet of a school. Consequently, the only conceivable difference between the two was in the content of their messages. In our case, on the other hand, the plaintiffs seek to picket at a residence, but they protest the exemption granted certain picketers at a place of employment. The classification made by the Illinois statute distinguishes picketing at a residence and picketing at a place of employment. The statute thus regulates on the "neutral" ground of place rather than the impermissible ground of subject matter.[18]

The second classification, between picketing a place of employment involved in a labor dispute and picketing that same place of employment when no labor dispute exists, may well be based on content.[19] Plaintiffs,

[18] Of course, a classification which impinges on a fundamental right must still withstand strict scrutiny. This classification, however, is supported by a compelling state interest in providing a meaningful forum for labor protests. Whereas the plaintiffs have in City Hall a meaningful alternative forum for communicating their political views to the Mayor, an employee who works at a residence and who wishes to picket his place of work would be denied a meaningful forum for communicating his views if not for this statutory exception. Thus, since the classification furthers the compelling state interest of furnishing a meaningful forum for certain laborers, we hold that the exception created by the Illinois Residential Picketing Statute does not deny the plaintiffs equal protection of the laws.

[19] In *Mosley*, the plaintiff and labor picketers were similarly situated with respect to the time, place, and manner of their picketing. Thus, the only conceivable basis for their different classification was the content of their messages. In our case, on the other hand, plaintiffs and labor picketers are not similarly situated with respect to the place of their picketing. The only plaintiffs who would be similarly situated with respect to time, place, and manner and who would therefore be subjected to a content based classification are persons who seek to picket a place of employment when no labor dispute

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however, do not claim that Mayor Bilandic's home is a place of employment, and thus, even though the subject of their protest is not a labor dispute, plaintiffs are not members of a class against whom the statute discriminates. Plaintiffs, in other words, lack standing to challenge this second classification. This means that the only avenue of attack left open to plaintiffs is a facial challenge to this classification. Since, as we have said before, the statute's potential unconstitutionality is not substantial in comparison to its plainly legitimate sweep, we decline to declare the entire statute unconstitutional.[20] We therefore conclude that although plaintiffs have standing to challenge the first classification, it is a permissible classification based on place and that even though the second classification may be based on impermissible criterion of content, plaintiffs lack standing to challenge it.

[19] *continued*
exists. Yet, even though this second classification can logically be based only on content, it is not invalid *per se* for this reason. *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

[20] We agree with the Maryland Appellate Court that this exception is not severable from the rest of the statute. *State v. Schuller*, 280 Md. 305, 372 A.2d 1076, 1083-84 (1977). This also appears to be the way in which the Supreme Court regarded the exception in *Mosley*.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Filed October 4, 1979

ROY BROWN, et al.,

Plaintiffs-Appellants,

No. 78-2432 v.

WILLIAM J. SCOTT, as Attorney General of Illinois, BERNARD CAREY, as State's Attorney of Cook County, Illinois, JAMES E. O'GRADY, as Superintendent of the Police Department of the City of Chicago, and WILLIAM CRAVEN, as a Lieutenant in the Police Department of the City of Chicago,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois — No. 78 C 1105

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that BERNARD CAREY, as State's Attorney of Cook County, Illinois, one of the defendants abovenamed, hereby appeals to the Supreme Court of the United States from the final order of the Seventh Circuit, entered on August 2, 1979, reversing the judgment of the district court and remanding the case for entry of a final judgment order.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

BERNARD CAREY
State's Attorney of Cook County
By: .....
Ellen G. Robinson
Assistant State's Attorney

[CERTIFICATE OF SERVICE showing copies served by mail on October 4, 1979.]

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-703

BERNARD CAREY, as State's Attorney
of Cook County, Illinois,

Appellant,

—vs—

ROY BROWN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT FILED OCTOBER 31, 1979
PROBABLE JURISDICTION NOTED JANUARY 7, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-703

BERNARD CAREY, as State's Attorney
of Cook County, Illinois,

Appellant,

—vs—

ROY BROWN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

TABLE OF CONTENTS

The opinions of the District Court and the Court of Appeals and the Judgment of the Court of Appeals have been omitted in printing this appendix because they were printed in the appendix to the Jurisdictional Statement for Appellant Carey.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 24, 1978—	Plaintiffs' original Complaint filed in United States District Court for the Northern District of Illinois.
April 7, 1978—	Plaintiffs' Amended Complaint filed.
August 8, 1978—	Plaintiffs' Motion for Summary Judgment filed.
August 23, 1978—	Defendant Carey's Cross-Motion for Summary Judgment filed.
September 27, 1978—	Judgment of District Court filed granting Defendant Carey's Cross-Motion for Summary Judgment.
October 27, 1978—	Plaintiffs' Notice of Appeal filed.
August 2, 1979—	Opinion and Judgment of Court of Appeals for the Seventh Circuit filed.

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

ROY BROWN, FINLEY CAMPBELL, VICKI CAMPBELL, STEVE CARL, JOAN RAISNER, IRMA SAUCEDO, KAREN SHOLL WEINER, DAVID SMITH, LAWANDA SMITH, MARK SMITH, JULIANE SOUCHEK, BRANDA STADEL CARL, MARSHA VIHON, HOWARD WEINER, RICHARD WEST, and the COMMITTEE AGAINST RACISM, an unincorporated association, on their own behalf and on behalf of a class similarly situated,

Plaintiffs,

vs.

WILLIAM J. SCOTT, as Attorney General of Illinois, BERNARD CAREY, as State's Attorney of Cook County, Illinois, MICHAEL SPIOTTO, as Acting Superintendent of the Police Department of the City of Chicago, and WILLIAM CRAVEN, as a Lieutenant in the Police Department of the City of Chicago,

Defendants.

No. 78 C 1105

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION

Plaintiffs, Roy Brown, Finley Campbell, Vicki Campbell, Steve Carl, Joan Raisner, Irma Saucedo, Karen Scholl Weiner, David Smith, Lawanda Smith, Mark Smith, Juliane Souchek, Branda Stadel Carl, Marsha Vihon, Howard Weiner, Richard West, and the Committee Against Racism, an unincorporated association, individually and as representatives of a class, by their attorneys, Ellyn A. Hershman, Michael P. Seng and Edward Burke Arnolds, complain of defendants, William J. Scott, at Attorney General of Illinois, Bernard Carey, as State's Attorney of Cook County, Illinois, Michael Spiotto, as Acting Superintendent of the Police Department of the City of Chicago, and William Craven, as a lieutenant in the Police Department of The City of Chicago, as follows:

1. This is a civil action arising under Section 1983 of Title 42, United States Code. Plaintiffs bring this action, on their own behalf and on behalf of all others similarly situated, to have Article 21.1 of the Illinois Criminal Code, "Residential Picketing," *Ill. Rev. Stat.*, Ch. 38, §21.1 *et seq.* (hereinafter sometimes the "Illinois Residential Picketing Statute"), declared unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States, and to have the defendants preliminarily and permanently enjoined from enforcing it.

JURISDICTION

2. The jurisdiction of this Court arises under Title 28 U.S.C., Sections 1343, 2201, 2202 and 1651, Title 42 U.S.C., Section 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

PARTIES

3. Plaintiffs are as follows: Plaintiffs Roy Brown, Finley Campbell, Vicki Campbell, Steve Carl, Joan Raisner, Irma Saucedo, Karen Sholl Weiner, David Smith, Lawanda Smith, Mark Smith, Juliane Souchek, Branda Stadel Carl, Marsha Vihon, Howard Weiner and Richard West (hereinafter sometimes the "individual" plaintiffs) are all citizens of the United States and the State of Illinois, and all reside in the County of Cook, City of Chicago. Plaintiffs Roy Brown, Finley Campbell, David Smith and Lawanda Smith are black. Plaintiff Irma Saucedo is brown. The other individual named plaintiffs are white. All the plaintiffs are actively working to achieve equality among

the races and civil rights for all persons, and to end discrimination. All the individual plaintiffs are members of the Committee Against Racism.

(b) Plaintiff Committee Against Racism (hereinafter "CAR") is an unincorporated multi-racial association of more than 100 persons which has as its purpose the aboli- of racism. To achieve this purpose, CAR members often engage in First Amendment-protected activity, including picketing.

(c) All the individual plaintiffs except Joan Raisner and David Smith have been arrested for, and found guilty of, violating the Illinois Residential Picketing Statute. These plaintiffs (hereinafter sometimes the "Arrestees") do not seek to attack collaterally their former convictions, and no prosecutions are now pending against them under the Illinois Residential Picketing Statute.

(d) Plaintiff David Smith engaged in exactly the same conduct for which the Arrestees were prosecuted under the Illinois Residential Picketing Statute, but he himself was not arrested or charged.

(e) Plaintiff Joan Raisner has not engaged in conduct purportedly prohibited by the Illinois Residential Picketing Statute, and she has not been arrested or prosecuted therefor, but she and the other members of CAR wish to engage in such conduct in the future.

4. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated, pursuant to Rule 23(b) of the Federal Rules of Civil Procedure. The class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims or defenses of the representative parties are typical of the claims or defenses of the class;

and the representative parties will fairly and adequately protect the interest of the class. In addition, defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

5. Defendants are as follows:

(a) Defendant Scott is the Attorney General of the State of Illinois. As such he is responsible for enforcing the laws of said state.

(b) Defendant Carey is the State's Attorney of Cook County, Illinois. As such he is responsible for advising the Police Department of the City of Chicago as to violations of Illinois Statutes and for the prosecution of persons charged with such violations.

(c) Defendant Spiotto is the Acting Superintendent of the Police Department of the City of Chicago. As such he is responsible for enforcing the laws of the State of Illinois within said city.

(d) Defendant Craven is a lieutenant in the Chicago Police Department assigned to the 9th Chicago Police District. As such, he is and was responsible for enforcing the laws of the State of Illinois within the said district. On information and belief, the defendant Craven is regularly, and was at all times hereto pertinent, Acting Watch Commander for the 9th District.

(e) At all times hereto pertinent, defendants were acting under color of the statutes, customs or usages of the State of Illinois.

FACTS

6. On Tuesday, September 6, 1977, at about 6:15 p.m., several members of CAR, including the Arrestees and David Smith, went to 3238 S. Union in the City of Chicago, at which address Michael A. Bilandic, the Mayor of the City of Chicago, maintains his residence, to picket peacefully on the public sidewalk in front of the Mayor's residence in protest of the Mayor's failure to take a public position regarding the busing of school children to achieve racial integration (hereinafter referred to simply as "busing").

7. Shortly after they arrived, the picketers were informed by the defendant Craven that they were prohibited under the Illinois Residential Picketing Statute from picketing a private residence and that they would have to leave the premises.

8. When the picketers asserted their right to picket and refused to leave, four of them were arrested. Most of the other picketers, including the Arrestees but excluding David Smith, then left the vicinity of Mayor Bilandic's residence and went to the 9th-District station house at 35th and Lowe streets in Chicago to picket in protest of the four arrests. The picketers were told by a 9th-District police officer that they could picket the police station as long as they kept moving and did not block the sidewalk.

9. Shortly thereafter, the defendant Craven arrived and, along with other Chicago police officers, took the Arrestees into custody for having previously picketed the Mayor's residence.

10. The defendant Craven subsequently signed formal complaints charging the plaintiffs with Disorderly Conduct and Unlawful Residential Picketing. The Unlawful Residential Picketing complaints each alleged as follows:

> "[NAME] has, on or about 6 September 1977 at 3238 South Union committed the offense of Unlawful Residential Picketing in that he knowingly did picket a private residence, not used as a business, to wit: 3238 South Union Avenue, Chicago, Ill. in violation of Chapter 38 Section 21.1-2 of the Illinois Revised Statutes.
>
> (signed) Lieut. William Craven"

11. On October 18, 1977, the Arrestees appeared in Branch 46 of the Circuit Court of Cook County, Illinois, before the Honorable John F. Reynolds, a judge of that court, where pursuant to a plea agreement previously entered into between Arrestees' attorneys and an Assistant State's Attorney of Cook County, the Arrestees pleaded guilty to the charges of Unlawful Residential Picketing and the Disorderly Conduct charges were dismissed.

12. The following sentences were imposed:

(a) Plaintiffs Finley Campbell, Vicki Campbell, Branda Stadel Carl, Irma Saucedo, Karen Sholl Weiner, Lawanda Smith, Mark Smith, Juliane Souchek and Marsha Vihon were sentenced to six months' supervision pursuant to *Ill. Rev. Stat.*, Ch. 38, §1005-6-3.1. This period of supervision terminated on March 14, 1978.

(b) Plaintiffs Roy Brown, Steve Carl, Howard Weiner and Richard West were sentenced to one year's supervision, also pursuant to *Ill. Rev. Stat.*, Ch. 38, §1005-6-3.1. The one year period of supervision will end on October 18, 1978.

13. On information and belief, defendants intend to continue to enforce the Illinois Residential Picketing Statute.

14. Plaintiffs wish to engage again in residential picketing to demonstrate in Chicago neighborhoods their concern

for racial equality, civil rights and racial integration, but their right to do so is chilled by the threat of enforcement of the Illinois Residential Picketing Statute. Plaintiffs must choose between intentionally flaunting state law or foregoing what they believe to be constitutionally protected activity in order to avoid becoming enmeshed in another criminal proceeding.

15. The Illinois Residential Picketing Statute provides, *Ill. Rev. Stat.*, Ch. 38, §21.1:

ARTICLE 21.1 RESIDENTIAL PICKETING

§21.1-1. Legislative finding and declaration. The Legislature finds and declares that men in a free society have the right to quiet enjoyment of their homes; that the stability of community and family life cannot be maintained unless the right to privacy and a sense of security and peace in the home are respected and encouraged; that residential picketing, however just the cause inspiring it, disrupts home, family and communal life; that residential picketing is inappropriate in our society, where the jealously guarded rights of free speech and assembly have always been associated with respect for the rights of others. For these reasons the legislature finds and declares this Article to be necessary. Added by act approved June 29, 1967. L.1967, p. 940.

§21.1-2. Prohibition-Exceptions. It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest. Added by act approved June 29, 1967. L.1967, p. 940.

§21.1-3. Sentence. Violation of Section 21.1-2 is a Class B misdemeanor.
Amended by P.A. 77-2638, §1, eff. Jan. 1, 1973.
Section added: L. 1967, P. 940.

16. The Illinois Residential Picketing Statute is unconstitutional in that it violates the First and Fourteenth Amendments to the Constitution of the United States in at least the following respects:

(a) Section 21.1-2 is overbroad in that it completely outlaws most types of peaceful residential picketing without regard to the number of pickets or the manner or time of the picketing, and thus it is not a regulation narrowly drawn to reach only certain specified conduct which impinges on valid state interests, but on the contrary it abridges the freedom of speech and the right of the people peaceably to assemble and to petition for a redress of grievances.

(b) Section 21.1-2 is an unlawful attempt to regulate the content of speech in that it permits, without restriction, the picketing of (i) a picketer's own residence or dwelling; (ii) a residence or dwelling which is also a place of business; (iii) a residence or dwelling which also is a place of employment involved in labor dispute; and (iv) a residence or dwelling which is "the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest," but totally prohibits all other residential picketing, including picketing the residence of a mayor to protect (sic) his failure to take a public position regarding busing.

(c) Section 21.1-2 is void for vagueness in that a person of ordinary intelligence cannot discern, in many cases, precisely what picketing is proscribed. Be-

sides not giving fair notice, Section 21.1-2 thus also vests law enforcement personnel with the power to define the limits of protected conduct and with unnecessarily broad discretion to make arrests for picketing.

(d) Section 21.1-2 is a denial of equal protection of the law in that it permits, without restriction, the picketing of (i) a picketer's own residence or dwelling; (ii) a residence or dwelling which is also a place of business; (iii) a residence or dwelling which is also a place of employment involved in a labor dispute; and (iv) a residence or dwelling which is "the place of holding a meeting or assembly on premises commonly used to discuss subjects to general public interest," but totally prohibits all other residential picketing, including picketing the residence of a mayor to protest his failure to take a public position regarding busing.

17. Defendants' enforcement of the Illinois Residential Picketing Statute against plaintiffs and their class prevents plaintiffs and their class, under color of a statute, custom or usage of the State of Illinois, from engaging in peaceful residential picketing to petition regarding racial discrimination, in violation of the First and Fourteenth Amendments to the Constitution of the United States and Section 1983 of Title 42, United States Code.

18. There is an actual controversy between the parties as hereinbefore set forth.

19. Plaintiffs and their class have no adequate remedy at law for the deprivation of their constitutional rights as hereinabove stated. Unless this Court issues an injunction as prayed for, plaintiffs and their class will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray that this Court:

1. Issue a declaratory judgment declaring the Illinois Residential Picketing Statute unconstitutional and void.

2. Issue preliminary and permanent injunctions enjoining defendants from making arrests under, prosecuting under, or in any manner whatsoever enforcing the Illinois Residential Picketing Statute against plaintiffs or the other members of their class.

3. Award plaintiffs their costs, including reasonable attorneys' fees.

4. Grant such further relief as may be appropriate.

One of Plaintiffs' Attorneys
Michael P. Seng
Edward Burke Arnolds, #89
315 South Plymouth Court
Chicago, Illinois 60604
(312) 427-2737

Ellyn A. Hershman
15325 S. Page
Harvey, Illinois 60426
(312) 339-5550

EXHIBIT TO AMENDED COMPLAINT

County of Cook
State of Illinois—ss

AFFIDAVIT

Mark Smith, being first sworn, deposes and says upon his oath:

1. That he is a plaintiff in the case of *Brown, et al.* v. *Scott, et al.*, 78 C 1105.

2. That he has read the Amended Complaint therein and to the best of his knowledge it is true and correct.

3. That on September 6, 1977, at about 6:15 p.m., he picketed a residence at 3238 S. Union, Chicago, Illinois.

4. That later the same evening he went to the police station at 35th and Lowe in Chicago where he was arrested and charged with disorderly conduct at the police station and with having picketed the residence at 3238 S. Union in violation of *Ill. Rev. Stat.*, Ch. 38, §21.1-2.

5. That on October 18, 1977, he appeared in the Circuit Court of Cook County, Illinois, where he pleaded guilty to the charge of residential picketing and where the charge of disorderly conduct was dismissed.

6. That on the same day he was sentenced to six-months' supervision after a finding of guilty was entered on his guilty plea.

7. He wishes to engage in residential picketing again but he does not do so because he is afraid he will again be arrested and prosecuted for violation of *Ill. Rev. Stat.*, Ch. 38, §21.1-2.

/s/ Mark Smith
Affiant

Subscribed and Sworn to before me
this 4th day of April, 1978

/s/ Della M. Danziger

Notary Public
My Commission Expires October 3, 1981

State of Illinois
County of Cook—ss

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

• • (Caption — No. 78 C 1105) • •

AFFIDAVIT

Vivian Buckhoy, being first duly sworn, deposes and says:

1. She is the chairperson of the Committee Against Racism ("CAR").

2. CAR organized among its members a picket of Mayor Michael A. Bilandic's residence on September 6, 1977, to protest the Mayor's failure to take a public position on the issue of busing.

3. Some of the picketers were arrested for violating the Illinois Residential Picketing Statute and, on October 18, 1977, pleaded guilty to the charges pursuant to a plea agreement whereby disorderly conduct charges would be dropped and the defendants sentenced to supervision.

4. CAR, through its members, did not seek to challenge the Illinois Residential Picketing Statute in the Illinois courts because it was advised that such a challenge would preclude the plea agreement, require a trial and in all probability an appeal, subject the defendants to the risk of substantial fines and jail sentences, and entail prolonged and expensive proceedings.

5. As of October 18, 1977, CAR had no immediate plans to engage in further picketing of the Mayor's residence because at that time, in CAR's opinion, busing was not a

current issue since the school year was well underway, and because of the recent arrests and prosecutions.

6. Subsequently, busing and the Mayor's refusal to take a stand thereon, again became current issues, as readily appears from the newspaper articles attached hereto as exhibits A and B.

7. But for the Illinois Residential Picketing Statute, CAR would organize another picket of Mayor Bilandic's residence to protest his continuing failure to take a public stand on busing.

8. In CAR's opinion, its proposed protest will lose a substantial amount of its effect if it cannot take place prior to the opening of the Chicago Public Schools in September, 1978.

9. The federal complaint challenging the Illinois Residential Picketing Statute was promptly filed by CAR members the very day the first periods of supervision terminated.

/s/ Vivian Buckhoy

Subscribed And Sworn To before me
this 5th day of June, 1978.

/s/ Joan V. Rolek

Notary Public

State of Illinois
County of Cook—ss

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

• • (Caption — No. 78 C 1105) • •

AFFIDAVIT

Joan Raisner, being first duly sworn, deposes and says upon her oath:

1. She is a member of the Committee Against Racism.

2. She has never been arrested or charged under the Illinois Residential Picketing Statute.

3. She did not participate in the September 6, 1977, picket of Mayor Bilandic's home.

4. She will picket the Mayor's home in the future to protest his failure to take a public stand on busing if CAR is allowed to organize such a picket.

/s/ Joan K. Raisner

Subscribed And Sworn To before me
this 5th day of June, 1978

/s/ Joan V. Rolek

Notary Public

State of Illinois
County of Cook—ss

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

* * (Caption — No. 78 C 1105) * *

AFFIDAVIT

David Smith, being first duly sworn, deposes and says upon his oath:

1. He is a member of the Committee Against Racism.

2. He participated in a picket of Mayor Bilandic's residence on September 6, 1977, for which 19 of his fellow picketers were arrested and charged with residential picketing.

3. Affiant engaged in substantially the same conduct to those who were arrested and charged.

4. Affiant was not arrested or charged.

5. But for the threat of arrest and prosecution, affiant would again picket the Mayor's residence for substantially the same reasons he did so on September 6, 1977.

/s/ David L. Smith

Subscribed And Sworn To before me
this 5th day of June, 1978.

/s/ Joan V. Rolek

Notary Public

State of Illinois
County of Cook—ss

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

* * (Caption — No. 78 C 1105) * *

AFFIDAVIT

Finley Campbell, being first duly sworn, deposes and says upon his oath:

1. He is a member of the Committee Against Racism.

2. He participated in a picket of Mayor Michael A. Bilandic's residence on September 6, 1977, to protest the Mayor's failure to take a stand on busing, for which affiant was arrested and charged, along with his wife and 17 other persons, with residential picketing.

3. On October 18, 1977, affiant pleaded guilty to the charge of residential picketing and was sentenced to 6 months' supervision in accordance with a plea agreement whereby disorderly conduct charges also placed against affiant were dismissed.

4. Affiant did not challenge the Illinois Residential Picketing Statute in state court because he was advised that such a challenge could not be maintained if affiant pleaded guilty; that such a challenge would require a trial and almost certainly an appeal; that by going to trial affiant would risk conviction on both charges and sentences substantially in excess of 6 months' supervision; that the trial and appeal were likely to be prolonged and costly; and because as of October 18, 1977, affiant had no plans to engage again in residential picketing.

5. Busing has again become an issue in Chicago and affiant believes Mayor Bilandic has again failed to take a stand on the issue.

6. But for the threat of again being arrested and prosecuted under the Illinois Residential Picketing Statute, affiant would again picket Mayor Bilandic's residence to demonstrate in the Mayor's own neighborhood affiant's concern for the Mayor's failure to exert moral leadership on a neighborhood issue.

7. In affiant's opinion, in order to have full effect such a demonstration must take place before the opening of the Chicago Public Schools in September, 1978.

8. On March 24, 1978, the day affiant's supervision was to terminate, he caused to be filed in federal court a lawsuit challenging the Illinois Residential Picketing Statute but he is not challenging his state conviction in either state or federal court.

/s/ Finley C. Campbell

Subscribed And Sworn To before me
this 5th day of June, 1978.

/s/ Joan V. Rolek

Notary Public

State of Illinois
County of Cook—ss

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

* * (Caption — No. 78 C 1105) * *

AFFIDAVIT

Roy Brown, being first duly sworn, deposes and says:

1. He is a plaintiff in Brown, et al v. Scott, et al, 78 C 1105.

2. On September 6, 1977, he picketed Mayor Michael A. Bilandic's residence to protest the Mayor's failure to take a public position in favor of busing school children.

3. On October 18, 1977, affiant pleaded guilty to a charge of residential picketing which arose from his protest at the Mayor's home and he was sentenced to one-year's supervision pursuant to a plea agreement which also included dismissing a disorderly conduct charge.

4. Affiant did not contest the constitutionality of the Illinois Residential Picketing Statute in state court because he was informed that he could not do so and plead guilty; that a trial and appeal would be lengthy and expensive; that he risked two convictions and jail or fines if he went to trial and lost; and because he had no plans to engage in residential picketing again.

5. Affiant is not challenging his residential picketing conviction in any court.

6. Mayor Bilandic still has not publicly taken a position in favor of busing and busing has again become an issue in Chicago.

7. But for the fact that affiant is still on supervision, and the threat of having his supervision revoked and again being arrested and prosecuted for violation of the Illinois Residential Picketing Statute, affiant would again picket the Mayor's residence to protest in the Mayor's own neighborhood his lack of leadership on a neighborhood issue.

8. In affiant's opinion, in order for such a picket to have effect it must take place before the opening of the Chicago Public Schools in September, 1978.

/s/ Roy L. Brown

Subscribed And Sworn To before me
this 5th day of June, 1978.

/s/ Joan V. Rolek

Notary Public

Condo owners, janitors in job dispute

Bill Barnhart

If you owned a home and you got a letter from the Janitors Union saying you must employ a union janitor, you might be a little upset. You'd be even more upset if union pickets showed up around your home the next day.

But that's the situation Chicago area owners of condominiums and co-operative apartments face with Local 1 of the Janitors Union.

On the other hand, Chicago area janitors face loss of bargaining power, reduction of wages and the elimination of jobs in the transition of their places of employment into buildings controlled by independent, cost-conscious, and sometimes anti-union condominium and co-op boards.

RECENT EFFORTS by some condo and co-op owners to resist the union have resulted in prolonged picketing of a few condominiums and co-operatives by the janitors in Des Plaines, Forest Park and the Hyde Park neighborhood of Chicago. Picketing costs the union an estimated $25 per day per man.

To help resolve this problem, an area-wide committee of condo and co-op owners was formed last weekend after a meeting of owners in Hyde Park. The 20-member committee from Chicago and suburbs will consider these questions:

• Should Chicago area condo and co-op owners unite to form a collective bargaining unit for negotiations with the Janitors Union?

• If such a unit is formed, what type of contractual relationship with the janitors should be sought and who would be bound by the contract?

Claire Rosen, attorney for Local 1, said, "We're sincerely hoping that they will get a group together that we can sit down with and discuss their problems."

THE ISSUES regarding union janitors in condos and co-ops revolve around two disputes: the jurisdiction of the union and the services and costs of union janitors. As more condos and co-ops are built or converted from rental status, and as the owners of condos and co-ops scrutinize more closely the costs of maintaining their buildings, these issues become increasingly important

Turn to Page 8

of picketing by the union last year by having one of its owners join the union and pay dues. Then the building was free to hire whomever it wished as the "janitor's helper."

IN 1971, the National Labor Relations Board declined to enter a dispute between Florida condo owners and the Service Employes International Union on the grounds that a condominium wasn't a business. But condos are business as far as the Janitors Union is concerned.

In 1967, the Illinois Legislature outlawed the picketing of residences saying "it disrupts home, family and communal life" and is "inappropriate in our society." But the legislature granted exceptions "when the residence is used as a place of business" or is "a place of employment involved in a labor dispute." This exception is what the union has hung its picket signs on.

The union has been picketing the 43-unit Diplomat Condominium in Des Plaines since August. Bert Paley, one of the unit owners, said the picketing began after the condo board dismissed the management firm that had been brought in by the developer. When the management firm was dismissed, so was the janitor the management firm had employed.

"We have maintained the building much better than it was before," Paley told the Hyde Park meeting. "We own our own homes. If we had 43 homes down the street the janitors would have no jurisdiction whatsoever."

THE SMALL amount of picketing that has occurred recently has been peaceful, although some owners report acts of vandalism. The biggest problem is getting rid of garbage if union garbage truck drivers won't cross the picket line.

Regarding the costs and services of janitors, condo and co-op owners argue that they shouldn't be forced to pay under a contract designed to cover an employe who performs vastly different services than they require. Such chores as maintenance within the units, cleaning and showing of apartments and even seasonal installation of storm windows and screens often are not performed by janitors in condos and co-ops.

No. 79-703

In the Supreme Court of the United States

OCTOBER TERM, 1979

BERNARD CAREY, as State's Attorney of Cook County Illinois,

Appellant,

vs.

ROY BROWN, et al.,

Appellees.

On Appeal From The United States Court
Of Appeals For The Seventh Circuit

MOTION OF APPELLEES TO AFFIRM

MICHAEL P. SENG
EDWARD BURKE ARNOLDS
315 South Plymouth Court
Chicago, Illinois 60604
Counsel for Appellees

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-703

BERNARD CAREY, as State's Attorney of Cook County Illinois,

Appellant,

vs.

ROY BROWN, et al.,

Appellees.

On Appeal From The United States Court
Of Appeals For The Seventh Circuit

MOTION OF APPELLEES TO AFFIRM

Pursuant to Rule 16 of the Rules of the United States Supreme Court, Appellees in the above-entitled case move that the opinion and order of the Court of Appeals for the Seventh Circuit be affirmed on the ground that the question presented is so unsubstantial as not to warrant further argument.

I.

The opinions below, the bases for jurisdiction, the statute involved and the statement of the case are satisfactorily set forth in the Jurisdictional Statement for Appellant Bernard Carey.

II.

The Jurisdictional Statement for Appellant Bernard Carey misstates the question presented. Appellant Carey formulates the question [J.S. at 4]: "Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes, but permits limited picketing of homes used for non-residential public purposes?"

The Illinois Residential Picketing Statute permits labor picketing not only of "dwellings used for non-residential public purposes" but also of "dwellings used solely for private residential purposes." See *Brown* v. *Scott,* 602 F.2d 791, 793-94 (7th Cir. 1979), J.S. App. at 5a-6a. The question presented, properly formulated, is: "Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes except labor picketing?"

III.

The Seventh Circuit correctly held that there is no principled basis for distinguishing the Illinois Residential Picketing Statute from the ordinance held to be unconstitutional by this Court in *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972). *Brown* v. *Scott, supra,* 608 F.2d at 794, J.S. App. at 7a. See also *People Acting Through Community Effort* v. *Doorley,* 468 F.2d 1143, 1145-46 (1st Cir. 1972). In virtually the same language as the Chicago ordinance struck down in *Mosley,* the Illinois statute impremissibly regulates speech based on content. This Court has consistently reaffirmed the Constitu-

tional basis of *Mosley*—that speech may not be regulated solely on the basis of its content. See, *e.g., First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785 (1978); *Hudgens* v. *National Labor Relations Board,* 424 U.S. 507, 520 (1976); *Young* v. *American Mini Theatres,* 427 U.S. 50, 64 (1976); *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 94 (1976); *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 209, 215 (1975).

Appellants argue that the state's interest in protecting residential privacy distinguishes this case from *Mosley.* The Court of Appeals found it unnecessary to strike a balance between the First Amendment rights and the right to privacy by expressly reserving the question whether a properly drafted residential picketing statute which did not discriminate on the basis of content would be constitutional. By deciding this case on equal protection grounds, the Court of Appeals properly avoided considering this novel constitutional question, as well as the further question whether the statute as drafted was overbroad or void for vagueness. *Brown* v. *Scott, supra,* 602 F.2d at 795, J.S. App. at 8a.

Appellants further attempt to distinguish *Mosley* on the ground that the statute involved in *Mosley* protected public property while the Illinois Residential Picketing Statute protects private property. This case does not present a situation where the picketing occurred on private property. Compare *Hudgens* v. *National Labor Relations Board, supra.* The picketing occurred on public streets and sidewalks, which have been consistently recognized as public forums. See *Hague* v. *C.I.O.,* 307 U.S. 496 (1939). There is no allegation that any trespass was committed against either private or public property. Compare *Adderley* v. *Florida,* 385 U.S. 39 (1966). Furthermore, this Court has recognized that there is an important governmental inter-

est in preventing disruption in the schools. *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969). Therefore, the Court of Appeals correctly recognized that no principled distinction could be drawn between an ordinance which discriminates in favor of labor picketers and against civil rights picketers in a school setting and a statute which similarly discriminates between them in a residential setting.

CONCLUSION

Wherefore, for the foregoing reasons, the decision of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

MICHAEL P. SENG
EDWARD BURKE ARNOLDS
315 South Plymouth Court
Chicago, IL 60604
(312) 427-2737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-703

BERNARD CAREY, as State's Attorney of Cook County, Illinois,

Appellant,

vs.

ROY BROWN, et al.,

Appellees.

Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF FOR APPELLANT BERNARD CAREY

BERNARD CAREY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-5444,
Attorney for Appellant Carey.

PAUL P. BIEBEL, JR.,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

ELLEN G. ROBINSON,
Assistant State's Attorney,
Of Counsel.

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OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A, pp. 1a-9a) is reported at 602 F.2d 791 (7th Cir. 1979). The opinion of the district court (J.S. App. B, pp. 11a-45a) is reported at 462 F. Supp. 518 (N.D. Ill. 1978).

JURISDICTION

The judgment of the court of appeals (J.S. App. A, p. 10a) was entered on August 2, 1979. Appellant Carey's jurisdictional statement was filed on October 31, 1979, and the Court noted probable jurisdiction on January 7, 1980. The jurisdiction of this Court rests upon 28 U.S.C. §1254(2).

QUESTION PRESENTED

Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes, but permits limited picketing of homes used for non-residential purposes?

STATUTE INVOLVED

Illinois Revised Statutes, ch. 38,
§§ 21.1-1 through 21.1-3 (1967):

"§ 21.1-1. Legislative finding and declaration.] The Legislature finds and declares that men in a free society have the right to quiet enjoyment of their homes; that the stability of community and family life cannot be maintained unless the right to privacy and a sense of security and peace in the home are respected and encouraged; that residential picketing, however just the cause inspiring it, disrupts home, family and communal life; that residential picketing is inappropriate in our society, where the jealously guarded rights of free speech and assembly have always been associated with respect for the rights of others. For these reasons the Legislature finds and declares this Article to be necessary.

§ 21.1-2. Prohibition—Exceptions.] It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.

§ 21.1-3. Sentence.] Violation of Section 21.1-2 is a Class B misdemeanor."

STATEMENT

The appellees brought this action under 42 U.S.C. §1983 and 28 U.S.C. §§1343 and 2201. They sought a declaration that the Illinois Residential Picketing Statute, Ill. Rev. Stat., ch. 38, § 21.1-1 *et seq.* (1967), is unconstitutional on its face and as applied, and they sought to have the appellant preliminarily and permanently enjoined from enforceing the Statute. The district court upheld the Statute, but the Court of Appeals for the Seventh Circuit reversed on the ground that the Statute violates the Equal Protection Clause of the Fourteenth Amendment.

There is no dispute concerning the facts in this case. The appellees are all members of an organization called the Committee Against Racism, characterized in their amended complaint as an anti-racist activist group (A. 3a-4a). In 1977, 14 of the appellees picketed on the sidewalk in front of the single family home of the then-Mayor of Chicago, Michael A. Bilandic (A. 6a). The purpose of the picketing was to demonstrate to the Mayor that the picketers disapproved of the Mayor's failure to support busing as a means of achieving racial integration in Chicago schools (A. 6a, 13a). Thirteen of the appellees were arrested for their participation in the picketing (A. 5a-7a). Those arrested pleaded guilty to violating the Illinois Residential Picketing Statute and were sentenced to supervision (A. 7a). At the time this litigation was initiated the period of supervision had terminated for all but four of the appellees (A. 7a).

In 1978, the appellees wished to renew their picketing of Mayor Bilandic in his home to urge him to support busing (A. 7a, 14a, 15a, 16a, 18a, 20a; J.S. App. B, p. 22a). Appellant Carey conceded, and the district court found, that

if the appellees had again conducted a residential picket of the Mayor's home, they would again have been arrested and prosecuted for violating the Illinois Residential Picketing Statute (J.S. App. B, pp. 25a-26a). Rather than expose themselves to additional criminal prosecutions, the appellees filed this Section 1983 action, seeking a declaration that the Illinois Residential Picketing Statute is unconstitutional and requesting that its enforcement be enjoined (A. 10a, 11a).

Ruling on cross-motions for summary judgment supported by affidavits and briefs, the district court denied all relief (J.S. App. B, pp. 11a-45a). The district judge held that, as the appellees sought only prospective relief, he was not required to abstain from deciding the issues merely because some of the appellees had once pleaded guilty to violating the Illinois Residential Picketing Statute (J.S. App. B, pp. 12a-18a). He also held that the appellees had presented sufficient evidence to establish that there was a ripe controversy between the parties (J.S. App. B, pp. 18a-26a). On the merits, the district judge held that the Statute, both on its face and as applied, was constitutional under the First Amendment (J.S. App. B, pp. 26a-42a). Finally, the judge held that the Statute did not deprive the appellees of their equal protection rights (J.S. App. B, pp. 42a-45a). He considered that the Statute created two classifications: the classification between picketing a home and picketing a place of employment, and the classification between picketing a place of employment where a labor dispute exists and one where no labor dispute exists. The judge held that the first classification was constitutional because it furthered the state's interest in furnishing an appropriate forum for labor picketers (J.S. App. B, p. 44a, n. 18). The judge viewed the second classification as substantially identical to the clas-

sification found unconstitutional in *Police Department of the City of Chicago* v. *Mosely,* 408 U.S. 92 (1972). But the judge held that the appellees did not have standing to challenge this second classification because the Mayor's home was not claimed to be "a place of employment" (J.S. App. B, p. 45a).

The Seventh Circuit reversed. That court did not reach the First Amendment issue presented (J.S. App. A, p. 8a, n. 6). As to the equal protection issue, the court rejected the district judge's analysis of the classifications created by the Illinois Residential Picketing Statute as inconsistent with the Statute's avowed purpose of regulating residential picketing. The court held that, properly construed, the Statute *only* regulated picketing at residences, not residences *and* places of employment, and that the appellees had standing to challenge the Statute both on its face and as applied (J.S. App. A, pp. 4a-6a and 7a, n. 5). In the view of the Seventh Circuit, this Court's decision in *Mosely* compelled a finding that the Statute violated the Equal Protection Clause of the Fourteenth Amendment (J.S. App. A. pp. 6a-8a). Appellant Carey appeals from that determination.

SUMMARY OF ARGUMENT

The Illinois Residential Picketing Statute generally prohibits all residential picketing, but it permits residential picketing of homes which are also places of employment involved in labor disputes. However, this "labor dispute" exception does not render the Statute unconstitutional under the Equal Protection Clause as construed in *Police Department of the City of Chicago* v. *Mosely,* 408 U.S. 92 (1972). *Mosely* stands for the principle that any legislative scheme which makes selections among picketers must be narrowly tailored to serve a compelling state interest. *Mosely* at 98; *cf. First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785-786 (1978).

Residential privacy, the interest served by the Illinois Residential Picketing Statute is, indeed, a compelling state interest. This Court's cases have firmly established that the right to be let alone at home is a fundamental individual right, of sufficient dignity to countervail the First Amendment rights of those who would convey uninvited messages to the resident at rest in his own home. *Rowan* v. *United States Post Office Dept.,* 397 U.S. 728 (1970); *FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978).

But the right of residential privacy is a personal right which can be waived or diluted by the resident himself. When a person makes his residence into a place of employment by bringing a worker into his home, the resident voluntarily dilutes his entitlement to total residential privacy, and the state's interest in legislatively protecting that privacy diminishes *vis a vis* the worker and others who may wish to communicate with or about the worker. In effect, therefore, labor picketing at a home which is also the situs of an employment relationship is an intrusion upon residential privacy that the resident invites upon himself.

These common-sense considerations are reflected in the labor dispute exception to the Illinois Residential Picketing Statute's general ban on residential picketing. This exception tailors the prohibitory effect of the Statute to the contours of the right of residential privacy which is being protected. Therefore, the Statute is narrowly drawn to serve a substantial governmental interest, and it is constitutional under *Mosely* and the Equal Protection Clause.

ARGUMENT

INTRODUCTION

This appeal concerns the Illinois Residential Picketing Statute, the right of residential privacy, and the power of the state to prohibit picketers from making residents captive audiences in their own homes.

Years ago, Justice Black, joined by Justice Douglas, invited states to enact regulations curbing residential picketing:

> "... picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators." *Gregory* v. *City of Chicago*, 394 U.S. 111, 125-126 (1969) (Black, J., concurring).

The Illinois Residential Picketing Statute generally prohibits all residential picketing, and it was indeed enacted to protect the privacy of people at rest within their own homes, "the last citadel . . ." *See* Ill. Rev. Stat. ch. 38, §21.1-1, Legislative Finding and Declaration. Some private homes, however, also serve non-residential functions, and in recognition of this fact the Illinois Residential Picketing Statute permits picketing of residences when used for non-residential purposes. The Statute provides:

> "It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of

> holding a meeting or assembly on premises commonly used to discuss subjects of general public interest." Ill. Rev. Stat. ch. 38, §21.1-2.

This Statute is challenged by a group of civil rights activists who want to picket the homes of local political officials in order to protest the officials' policies on public issues. The district court upheld the Statute against challenges on both First Amendment and equal protection grounds. But the Seventh Circuit considered that the statutory exceptions to the residential picketing ban regulated picketing on the basis of its communicative content in violation of the Equal Protection Clause as construed in *Police Department of the City of Chicago* v. *Mosely*, 408 U.S. 92 (1972). The court observed that the *Mosely* ordinance, like the Illinois Residential Picketing Statute, contained a "labor dispute" exception to a general ban on picketing at a certain location.* Impressed by this similarity, the court could find "no principled basis of distinction" between the two regulations. *Brown* v. *Scott*, 602 F.2d 791, 794 (7th Cir. 1979).

We submit that the Seventh Circuit's view of the rule of law expressed in the *Mosely* opinion was far too narrow and failed to reflect this Court's special concern for residential privacy, a right of fundamental importance in our society. We urge that the Seventh Circuit's opinion be reversed, and that the constitutionality of the Illinois Residential Picketing Statute be affirmed.

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* The *Mosely* ordinance prohibited "[Picketing or demonstrating] . . . on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit peaceful picketing of any school involved in a labor dispute." *Mosely* at 92-93.

I.

MOSELY DID NOT CREATE A *PER SE* RULE AGAINST CONTENT-RELATED SELECTIONS AMONG FIRST AMENDMENT ACTIVITIES.

Mosely concerned an ordinance which prohibited all picketing near schools, except for labor picketing of schools involved in labor disputes. The purpose of the regulation was to promote quiet classrooms, and the state urged that it was merely a "place" restriction on picketing near schools, constitutional under well established First Amendment principles. *E.g. Cox* v. *Louisiana,* 379 U.S. 536 (1965). The Court agreed that the ordinance raised serious First Amendment problems, but, considering that the problems fell within the intersection of the First and Fourteenth Amendments, determined to analyze the case under Fourteenth Amendment principles. Because labor picketing is as potentially disruptive as non-labor picketing, the Court observed that the ordinance prohibited some, *but not all* disruptive picketing, depending upon the message being conveyed by the picketers. The Court characterized this underinclusive selection among potentially disruptive picketers as a content regulation of speech, violative of the Equal Protection Clause.

But while *Mosely* prohibited selections among picketers based on "content *alone,*" *Mosely,* at 96 (emphasis added), it did not create a new *per se* rule against all content-related selections among picketers. In fact, the opinion specifically referred to the kinds of selections or distinctions a state could properly make:

> ". . . there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets. Conflicting demands on the same place may compel the State to make choices among users and uses . . . But these justifications for selective exclusions from a public forum must be carefully scrutinized. . . . discriminations among pickets must be tailored to serve a substantial governmental interest." *Mosely* at 98.

Thus, a content-related scheme of selective exclusions of picketers, which furthers an important state interest and is carefully tailored to the contours of the particular interest being protected, is constitutional. But a content-related scheme of selective exclusions which is not adequately tailored to the particular interest being protected results in unnecessary suppression of First Amendment conduct. In the words of *Mosely,* such selections are based on "content *alone,*" and are unconstitutional. Accordingly, under *Mosely* the test of the legality of any content selective regulation of First Amendment conduct depends upon a careful examination of the particular interest the regulation seeks to advance and of the relationship between that interest and the selections made.

The operation of this test is illustrated by an examination of two of the Court's post-*Mosely* opinions in cases which, like *Mosely,* presented problems implicating both the First Amendment and the Equal Protection Clause. In *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976), the Court considered a restrictive zoning plan which applied only to theaters exhibiting adult films. The Court first considered the plan under the First Amendment, which in the Court's view was not offended because the plan reasonably, and consistent with traditional First Amendment principles, regulated the "place" at which certain films could be shown. *Id.* at 62-63. However, Mr. Justice Stevens, writing for a plurality, noted that the plan operated as a content regulation of films, and therefore also

considered its constitutionality under *Mosely* and the Fourteenth Amendment. The state urged that the plan made selections among films and their exhibitors in order to preserve the character of urban neighborhoods, an interest which the plurality considered deserved "high respect." *Id.* at 71. Because the record contained sufficient facts to sustain the conclusion that the selections would have "the desired effect," the ordinance was held constitutional. *Id.* at 71.

Mr. Justice Powell, concurring, did not join in this second portion of the opinion. In his view, any restrictive effect that the zoning ordinance had on the content of films was limited to restricting the location for the exhibition of selected films. He did not analyze this problem in terms of *Mosely* and the Equal Protection Clause, but based his opinion on the First Amendment test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). While *O'Brien* did not discuss the Equal Protection Clause, its requirement that any restriction on First Amendment conduct further an important governmental interest in the least restrictive manner possible, is essentially the same as the "tailoring" requirement of *Mosely*. *Compare O'Brien* at 377, *with Mosely*, at 98.

Two years after *Young*, the Court considered a state criminal statute which imposed severe limitations on corporate "free speech" by prohibiting the expenditure of corporate funds to publicize the corporation's views on any referendum issue not materially affecting the interests of the corporation. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). The Court recognized that the statute was a blatant content-selective restriction of

"pure" speech.* Nevertheless, the regulation could have survived constitutional scrutiny under both the First and the Fourteenth Amendments if it had been "intimately related" to a compelling state interest. *Id.* at 785-786. Upon close analysis, however, the Court concluded that the regulation was not at all related to the state's first asserted interest: that of preserving the integrity of the electoral process. As to the state's other avowed purpose of protecting corporate shareholders, the Court found that the regulation was both underinclusive, (as the *Mosely* ordinance had been), in permitting some but not all corporate political activity, as well as overinclusive in prohibiting even expenditures endorsed by *all* the corporation's shareholders. Accordingly the statute was unconstitutional under both the First Amendment and the Equal Protection Clause.**

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* The Court also noted that the content selections made in the statute were especially odious to the First Amendment because they were suppressive of "one side of a debatable public question . . ." *Id.* at 785. By contrast, the content selections made in the zoning ordinance considered in *Young* v. *American Mini Theatres*, *supra*, 427 U.S. 50, turned on the *subject matter* of the restricted films, and were wholly neutral as to point of view. *Id.* at 70.

** These opinions are entirely consistent with the Court's other recent cases treating content based selections among communications and communicators. *E.g. Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (upholding the selective exclusion of political advertisements from public buses); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), and *United States Civil Service Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (both upholding regulations which limited government employees' political activities but not their other, non-political activities); *Greer* v. *Spock*, 424 U.S. 828 (1976) (upholding military installation's regulations which subjected partisan political activity to restrictions not imposed on non-political activities, because the regulations furthered the authorities' interest in main-

(Footnote continued on following page)

The foregoing cases, including *Mosely,* teach that the point of departure for the analysis of the Illinois Residential Picketing Statute, or any regulation which selectively restricts First Amendment activity, is a careful examination of the particular interest the Statute seeks to further.

II.

THE ILLINOIS RESIDENTIAL PICKETING STATUTE, AS TESTED UNDER *MOSELY*, IS NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST.

In analyzing the Illinois Residential Picketing Statute the Seventh Circuit focused only upon the similarities between the exception clauses in that Statute and the *Mosely* ordinance. We submit that this was a crucial error, for

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continued:

taining the political neutrality of the military establishment); *City of Madison* v. *Wisconsin Employment Relations Comm'n,* 429 U.S. 167 (1976) (holding that the state's permitting one teachers' representative but not another to address an open school board meeting was an unconstitutional content selection because it was unrelated to the state's interest in regulating public employee contract negotiations).

In an early picketing case, *Cox* v. *Louisiana,* 379 U.S. 559 (1965), the Court upheld an ordinance which prohibited picketing around a courthouse when the picketers' messages were aimed at the judicial process. However, the Court conceded that the ordinance did not prohibit picketing at the same courthouse targeted at a non-judicial city officer "who just happened to have an office located in the courthouse building." *Id.* at 567.

Finally, labor picketing cases traditionally draw distinctions among picketers based upon the relationship between the messages on the picket signs and the state and federal interests at stake. *E.g. NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local* 760, 377 U.S. 58 (1964) (consumer picket targeted at struck product, rather than secondary employer legal under National Labor Relations Act); *see also Internat'l Brotherhood of Teamsters, Local* 695, *A.F.L.* v. *Vogt, Inc.,* 354 U.S. 284 (1957), and the cases discussed therein.

the *Mosely* ordinance and the Illinois Residential Picketing Statute were aimed at protecting very different state interests. The *Mosely* ordinance sought to promote quiet public school classrooms. The Illinois Residential Picketing Statute was enacted to ensure residential privacy. These interests are profoundly different, and the differences supply the primary reason for reversing the Seventh Circuit's decision.

As the Court commented in *Mosely,* the state's interest in preventing classroom disruption is "substantial," *Mosely* at 99, but that interest is generally subordinated to the First Amendment rights of others. *E.g. Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969). By contrast, the right of residential privacy is fundamental in our society, and when conflicts arise between residential privacy and other rights—even exalted First Amendment rights—residential privacy is generally protected above all else. *See generally FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978).

A. Residental Privacy Is A Right Of Fundamental Importance.

The right of residential privacy is the right of every person to be let alone within his own home, unassaulted by uninvited communications. *See FCC* v. *Pacifica Foundation, supra.* It is a right which has not often been the focus of federal constitutional adjudication, for, as the Court recognized many years ago, its protection is "left largely to the law of the individual states." *Katz* v. *United States,* 389 U.S. 347, 350-351 (1967). Nevertheless, judges and commentators alike agree that the right is entitled "the greatest solicitude" in the constitutional scheme of things. *Pacifica Foundation, supra,* 438 U.S. at 764 (Bren-

nan, J., dissenting); *see generally* Chafee, Free Speech in the United States, 406 (1954), cited in *Hynes* v. *Mayor and Council of Borough of Oradell,* 425 U.S. 610, 619 (1976). Indeed, the Court's solicitude for residential privacy has been a theme underlying many of its opinions.

For example, Fourth Amendment doctrine was shaped by considerations of residential privacy, a "sacred right." *Boyd* v. *United States,* 116 U.S. 616, 630 (1886). In fact, early search and seizure cases treated the Fourth Amendment as simply embodying the fundamental maxim that "a man's house is his castle." *See Weeks* v. *United States,* 232 U.S. 383, 390-393 (1914). Contemporary cases recognize that Fourth Amendment protections extend well beyond the home. *E.g. United States* v. *Chadwick,* 433 U.S. 1 (1977). Nevertheless, it is the right of residential privacy which fortifies the constitutional barrier to warrantless arrests in the home, *Johnson* v. *United States,* 333 U.S. 10, 14 (1948), and warrantless searches of homes by health inspectors, *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), and peace officers, *Weeks* v. *United States, supra.*

Considerations of residential privacy support zoning laws which impact adversely on First Amendment associational rights. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974). The right to be let alone at home has been an important factor in the Court's procreative activity privacy cases. Taking its cue from Justice Harlan's often cited dissent in *Poe* v. *Ullman,* 367 U.S. 497, 550 (1961), the Court has consistently recognized residential privacy, rooted in the Fourth and Fourteenth Amendments, as one constitutional source for personal sexual privacy. *E.g. Griswold* v. *Connecticut,* 381 U.S. 479, 484-486 (1965); *Roe* v.

Wade, 410 U.S. 113, 153-154 (1973); *and see Stanley* v. *Georgia,* 394 U.S. 557 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch." *Id.* at 565.)

The Court has also been solicitous of residential privacy when called upon to resolve direct conflicts between that right and First Amendment rights of those who would send messages into the home. Among contemporary decisions, the first such direct conflict was presented in *Martin* v. *Struthers,* 319 U.S. 141 (1943), in which the Court struck an ordinance banning all door-to-door leafletting, while nevertheless recognizing that residents have protectable privacy interests in the quiet and peaceful enjoyment of their homes. *Id.* at 143-144. Indeed, in the later case of *Breard* v. *City of Alexandria, La.,* 341 U.S. 622 (1951), these privacy interests were held to outweigh the rights of commercial vendors who sought to engage in door-to-door solicitation. Recently the Court invalidated another solicitation ordinance, this time on vagueness grounds. *Hynes* v. *Mayor and Council of Borough of Oradell, supra,* 425 U.S. 610. But the Court unambiguously suggested that a properly drawn ordinance, enacted "to protect the peaceful enjoyment of the home," would be constitutional. *Id.* at 619-620.

An important aspect of the right of residential privacy is that it implicates the captive audience doctrine, which recognizes that while the First Amendment generally requires that persons be permitted to speak, it does not force intended targets to listen. The Court first enunciated this doctrine in *Packer Corp.* v. *Utah,* 285 U.S. 105 (1932), in which a statute regulating the content of outdoor display advertising withstood Fourteenth Amendment and

Commerce Clause challenges. The Court noted that, unlike other forms of advertising, billboards are "constantly before the eyes of observers on the streets and in streetcars to be seen without the exercise of choice or volition on their part." *Id.* at 110.

Years later the captive audience doctrine was the key to an important decision regarding the First Amendment problem raised by an ordinance banning loud, raucous sound-trucks from broadcasting on city streets. *Kovacs* v. *Cooper,* 336 U.S. 77 (1949). While recognizing that the content of the broadcasts was protected, the Court nevertheless upheld the ordinance. The unwilling listener, the Court reasoned, cannot avoid hearing the loud broadcast. "In his home or on the street he is practically helpless to escape this interference with his privacy by loudspeakers . . ." *Id.* at 87. Despite the breadth of this pronouncement, however, personal privacy and the captive audience doctrine were rejected, just three years after *Kovacs,* as grounds for prohibiting commercial radio broadcasts on public buses. *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451 (1952). But the Court noted this significant distinction: "However complete . . . [a citizen's] right of privacy may be *at home,* it is substantially limited by the rights of others when its possessor travels on a public thoroughfare . . ." *Id.* at 464 (emphasis supplied).

Finally, in 1970, the Court was presented with facts which squarely implicated both residential privacy rights and the captive audience doctrine. In *Rowan* v. *United States Post Office Dept.,* 397 U.S. 728 (1970), the Court upheld a regulation which permitted addressees to direct the Postmaster not to deliver pandering advertisements. Speaking for a unanimous Court, Chief Justice Burger declared:

> "We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even good ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." *Id.* at 738.

Opinions following *Rowan* treated as established beyond cavil the right of residential privacy as endowing the resident with the power to censure all uninvited communications. *E.g. Cohen* v. *California,* 403 U.S. 15, 21 (1971); *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 208 (1975); *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 95 (1977). In *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1975), the Court overturned an injunction against pamphleteering in the neighborhood of a real estate broker as an unconstitutional prior restraint. But the Court carefully distinguished *Rowan.* Pamphleteering in a neighborhood did not violate the broker's right of residential privacy because he "is not attempting to stop the flow of information into his own household, but to the public." *Id.* at 420.

The Court's most recent residential privacy decision was *FCC* v. *Pacifica Foundation, supra,* 438 U.S. 726, in which the Court held that a radio station could be censured for the broadcast of words which were indecent but not obscene. The Court considered that the broadcast media presents special First Amendment problems because its messages travel directly into "the privacy of the home,

where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder." *Id.* at 748. The decision also emphasized the importance of the captive audience aspects of the problem presented. Unlike the unwilling audience on the street, the captive listener at home should not bear the burden of "turning away" or "absorbing the first blow," *id.* at 748 and 759, for "a different order of values obtains in the home." *Id.* at 759 (Powell, J., concurring).

Surely, if under *Rowan* a resident is entitled to prevent an intrusion into his privacy as minor as unwanted mail, he has a right to prevent intrusions as major as unwelcomed picketers. Surely, if under *Pacifica Foundation* the state may censure an invasion of residential privacy as minimal as a radio broadcast of common street language, the state can seek to prohibit, by its criminal laws, an invasion as threatening as uninvited residential picketers. Clearly if a balance must be struck between the rights of picketers and residents, the scales must tip toward the residents. Picketers who are prohibited from residential picketing can picket their targets elsewhere. The picketed resident, however, has no way to protect his privacy before it is invaded by residential picketers, and he has no remedy with which to assuage himself after his privacy is destroyed. As Justice Douglas once noted, "Once privacy is invaded, privacy is gone." *Public Utilities Comm'n* v. *Pollak, supra,* 343 U.S. at 469 (Douglas, J., dissenting). Truly, of all captive audiences the picketed resident is the most vulnerable, for having retreated to his home he has retreated as far as possible and yet has not achieved quiet and privacy.

B. The Illinois Residential Picketing Statute's Selections Among Picketers Are Intimately Related To The Right Of Residential Privacy.

In the broadest sense *Pacifica Foundation* and its predecessor cases reflect a social judgment. It is more important to protect the home as a "last citadel of the tired" than to protect those who would send unwanted messages into the home. On the street it is the communicator who receives special consideration, *e.g. Cohen* v. *California, supra,* 403 U.S. 15, but in the home the resident is protected above all.

Nevertheless, the right to be let alone at home is a personal right and as such may be waived or diminished by the resident himself when he invites outsiders into his home for public, non-residential purposes. Where a private home is also used as a business, a place of employment or a public meeting place the balance between the privacy rights of the resident and the First Amendment rights of those who would transmit uninvited messages into the home may tip in favor of the communicator.

These common-sense considerations are reflected in the exceptions to the Illinois Residential Picketing Statute's prohibition of residential picketing. Other than allowing persons to picket their own homes, the Statute allows no picketing whatsoever of homes used only as homes. But when a residence is used also for a public purpose, its functions are expanded beyond those of a mere private home whose security, peace and privacy are of overriding legislative and constitutional concern.

It is well established that legislatures have broad latitude to regulate on a selective basis in order to protect captive audiences, such as picketed residents. "In such situations," the Court explained in another captive audi-

ence case, "the legislature may recognize degrees of evil and adopt its legislation accordingly." *Lehman* v. *City of Shaker Heights, supra,* 418 U.S. at 302. Nevertheless, the Seventh Circuit was unimpressed by both this precedent and by the Illinois legislature's sensitivity to the competing interests which may be affected by a restriction on residential picketing. It held that the labor dispute exception rendered the Residential Picketing Statute unconstitutional because a similar labor dispute exception had rendered the *Mosely* ordinance invalid. *Brown* v. *Scott, supra,* 602 F.2d at 794. But this rigid analysis cannot withstand scrutiny.

The intensity of the state's interest in preserving quiet classrooms does not vary depending upon whether the picketed school is also a "place of employment." Every school, by definition, is the situs of its teachers' employment relationships. By contrast, the intensity of the state's interest in preserving residential privacy is directly related to whether the target residence is also a "place of employment." The *only* homes that are the situs of employment relationships are those in which the resident has chosen to hire domestic help or home repairmen. But by the mere act of bringing a worker into his home, the resident voluntarily dilutes his entitlement to total residential privacy, and the state's interest in legislatively protecting that privacy logically diminishes *vis a vis* the worker and others who may wish to communicate with or about the worker. Allowing that worker or a labor organization to picket the resident when a labor dispute arises permits an intrusion upon residential privacy that the resident has invited upon himself.

In other words, there was *no* reasonable relationship between the labor dispute exception in *Mosely* and the contours of the state's interest in protecting quiet classrooms: either labor or non-labor picketing would have adversely affected that interest. But there is a necessary correlation between the labor dispute exception in the Illinois Residential Picketing Statute and the contours of the state's interest in protecting residential privacy: all residential picketing adversely affects residential privacy, but only labor picketing at a home which is also a place of employment adversely affects an interest in privacy *which has already been diminished by the resident himself.**

Therefore the Seventh Circuit's holding that there is "no principled basis of distinction" between the *Mosely* ordinance and the Illinois Residential Picketing Statute is erroneous. The distinctions between labor and non-labor picketers drawn by the *Mosely* ordinance were unrelated to the interest that the statute sought to protect. But the distinctions drawn by the Illinois Residential Picketing Statute are carefully molded and intimately related to the boundaries of the right to residential privacy.

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* In addition to allowing labor picketing, the Illinois Residential Picketing Statute provides that a person may picket his own home, and the Statute permits picketing of homes which are also places of business or places of holding public meetings. The Seventh Circuit did not consider these provisions, but was concerned only with the labor dispute exception to the general ban on residential picketing. *Brown* v. *Scott, supra,* 602 F.2d at 795, n. 6. We submit, however, that these additional exceptions, like the labor dispute exception, represent circumstances in which the resident waives or dilutes his right to residential privacy, either by making his home in a building which serves residential and non-residential functions, or by using his home for a public, non-residential function, or by picketing it himself. Accordingly, these exceptions are selections among residential picketers which, like the labor dispute exception, are molded to the boundaries of the right of residential privacy and are constitutional under *Mosely* and the Equal Protection Clause.

CONCLUSION

In *Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. 50, Mr. Justice Stevens cautioned lower courts against overly zealous application of *Mosely* without consideration of the principle for which *Mosely* actually stands:

> "This statement, [from *Mosely*], and others to the same effect, read literally and without regard for the facts of the case in which it was made, would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication. But we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached." *Id.* at 64-65.

The Court urged that lower federal courts be especially alert lest undue reliance upon *Mosely* result in unnecessarily striking state schemes which protect important state and individual interests. *Id.* at 72.

We submit that in considering the Illinois Residential Picketing Statute the Seventh Circuit ignored the warning of *Young,* and struck a legislative scheme which, upon close analysis, is constitutional under *Mosely* because it protects residential privacy, a fundamental individual right, by regulating residential picketing with requisite sensitivity to the competing interests affected.

For all the reasons stated above we urge that the decision of the Seventh Circuit be reversed, and that this Court

hold the Illinois Residential Picketing Statute constitutional under the Equal Protection Clause.

Respectfully submitted,

BERNARD CAREY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-5444,
Attorney for Appellant Carey.

PAUL P. BIEBEL, JR.,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

ELLEN G. ROBINSON,
Assistant State's Attorney,
Of Counsel.

February, 1980

No. 79-703

In the Supreme Court of the United States

OCTOBER TERM, 1979

BERNARD CAREY, as State's Attorney of Cook County, Illinois,

Appellant,

vs.

ROY BROWN, FINLEY CAMPBELL, VICKI CAMPBELL, STEVE CARL, JOAN RAISNER, IRMA SAUCEDO, KAREN SHOLL WEINER, DAVID SMITH, LAWANDA SMITH, MARK SMITH, JULIANE SOUCHEK, BRANDA STADEL CARL, MARSHA VIHON, HOWARD WEINER, RICHARD WEST, and the COMMITTEE AGAINST RACISM, an unincorporated association, on their own behalf and on behalf of a class similarly situated,

Appellees.

Appeal from the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR APPELLEES

EDWARD BURKE ARNOLDS
MICHAEL P. SENG
315 South Plymouth Court
Chicago, Illinois 60604
[312] 427-2737
Attorneys for Appellees

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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Appellees.

Appeal from the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR APPELLEES

QUESTIONS PRESENTED

I. Whether a state law which prohibits picketing at the residence or dwelling of any person, including peaceful political picketing at the residences of elected public officials, violates the Equal Protection Clause and the First Amendment by excepting labor picketing from that prohibition.

II. Whether a state may totally ban peaceful picketers seeking to convey appropriate political messages from the public streets and sidewalks in residential areas when there are less restrictive means of protecting the right to quiet enjoyment of the home.

III. Whether the Illinois Residential Picketing Statute is vague and overbroad.

STATEMENT OF THE CASE

The facts of this case are not in dispute. They are adequately set forth in the Brief for Appellant and the opinions of the courts below. It is undisputed that Appellees picketed in a peaceful manner, that they were on the public sidewalk in front of the residence of an elected public official, and that their message—promoting the busing of school children to achieve racial integration in Chicago's public schools—was squarely within the realm of protected speech. There is no evidence that their picketing disturbed anyone, that the public official was aware of their presence, or that Appellees in any way blocked traffic. Appellant concedes that Appellees want to picket on public property in front of the residences of local political officials in the future to protest those officials' policies on public issues, Brief for Appellant at 9, and that Appellees will again be arrested and prosecuted under the Illinois Residential Picketing Statute if they do so. Brief for Appellant at 4-5.

SUMMARY OF ARGUMENT

Appellees' past and proposed conduct—peaceful picketing on the public streets and sidewalks to protest the political actions of an elected public official—is "an exercise of [the] basic constitutional rights [of speech, assembly and petition] in their most pristine and classic form." *Edwards* v. *South Carolina,* 372 U.S. 229, 235 (1963); *accord, Thornhill* v. *Alabama,* 310 U.S. 88 (1940). The public streets and sidewalks have traditionally been regarded proper fora in

which to exercise this form of First Amendment activity, *Hague* v. *CIO,* 307 U.S. 496, 515 (1939); *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 152 (1968), regardless of whether the streets and sidewalks are located in residential areas. *See Gregory* v. *City of Chicago,* 394 U.S. 111 (1969); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971).

Legislation suppressing First Amendment freedoms is subject to strict scrutiny and can be sustained only if a state can demonstrate a subordinating interest which is compelling, *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 786 (1978), because "in our system, undifferentiated fear or apprehension is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines School District,* 393 U.S. 503, 508 (1969); *Police Dep't of Chicago* v. *Mosley,* 408 U.S. 92, 101 (1972). Legislation that infringes the right to use public streets for First Amendment expression must be aimed at specific evils and narrowly drawn. *Lovell* v. *Griffin,* 303 U.S. 444 (1938); *Cantwell* v. *Connecticut,* 310 U.S. 296, 304 (1940). Such legislation must be struck down if less restrictive alternatives are available, *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); *Lamont* v. *Postmaster General,* 381 U.S. 301, 310 (1965) (Brennan, J., concurring); *United States* v. *O'Brien.* 391 U.S. 367, 377 (1968), and there is a heavy presumption against the validity of prior restraints. *Organization for a Better Austin* v. *Keefe, supra,* 402 U.S. at 419 (1971).

Nevertheless, Illinois has adopted legislation making most picketing on the streets and sidewalks in residential areas a criminal offense.[1] The Illinois Residential Picketing Statute, *Ill. Rev. Stat.* ch. 38, §21.1-2 (1977), provides:

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[1] There is no official history of the legislation. For an unofficial account of the bill's passage see Heinz, Gettleman and Seeskin, *Legislative Politics and the Criminal Law,* 69 Nw.U.L.Rev. 277, 293-296 (1969).

> Prohibition-Exceptions. It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest. Added by act approved June 29, 1967, L. 1967, p. 940.[2]

This legislation is unconstitutional for three reasons. First, by making an exception for labor picketing the statute violates the Equal Protection Clause of the Fourteenth Amendment and the First Amendment's prohibition against governmental regulation of the content of speech. *See Police Dep't of Chicago* v. *Mosley,* 408 U.S. 92 (1972). Second, the statute violates the First and Fourteenth Amendments by banning residential picketing where a narrowly drafted statute regulating the time, place and manner of residential picketing would adequately safeguard the state's interest. *See Shuttlesworth* v. *Birmingham, supra.* Third, the statute is vague and overbroad. *See Hynes* v. *Mayor of Oradell,* 425 U.S. 610 (1976); *Coates* v. *Cincinnati,* 402 U.S. 611 (1971); *Connally* v. *General Construction Company,* 269 U.S. 385 (1926).

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[2] A violation of Section 21.1-2 is a Class B misdemeanor. *Ill. Rev. Stat.* ch 38, §21.1-3 (1977). A Class B misdemeanor is punishable by imprisonment for not more than six months, *Ill. Rev. Stat., supra,* ch. 38, §1005-8-3(a)(2), and/or a fine not to exceed $500. *Ill. Rev. Stat., supra,* ch. 38, §1005-9-1(a)(3). Other than this case below, there are no reported cases involving section 21.1-2.

ARGUMENT

I.

THE ILLINOIS RESIDENTIAL PICKETING STATUTE IS VOID UNDER POLICE DEP'T OF CHICAGO v. MOSLEY.

The Court of Appeals for the Seventh Circuit held that the Illinois Residential Picketing Statute, as applied to Appellees and on its face, violates the Equal Protection Clause of the Fourteenth Amendment as construed in *Police Dep't of Chicago* v. *Mosley,* 408 U.S. 92 (1972). *Brown* v. *Scott,* 602 F.2d 791, 795 (1979); *See also People Acting Through Community Effort* v. *Doorley,* 468 F.2d 1143, 1146 (1st Cir. 1972) (holding a similar statute invalid for the same reason). That judgment must be affirmed because, as the court of appeals held, no principled distinction can be drawn between this case and *Mosley.*

In *Mosley* the Court held invalid a Chicago ordinance which prohibited picketing or demonstrating "on a public way within 150 feet of any . . . school building while the school is in session . . . provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute. . . ." 408 U.S. at 92-93. Mosley was convicted under the ordinance for peacefully picketing a Chicago high school to protest the schools allegedly discriminatory admissions policies. The effect of the ordinance, the Court observed, was to permit peaceful picketing on the subject matter of a school's labor policies but to prohibit peaceful picketing on any other subject matter. 408 U.S. at 95. Since the latter form of picketing was not shown to be any more disruptive than the former, the regulation slipped from "the neutrality of time, place and

circumstance'' to a restriction based on subject matter. 408 U.S. at 99. The Court held:

> The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. . . . Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. . . . Such [disruption] ''can be controlled by narowly drawn statutes,'' *Saia* v. *New York,* 334 U.S. at 562, focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter. Chicago's ordinance imposes a selective restriction on expressive conduct far ''greater than is essential to the furtherance of [a substantial governmental] interest.'' *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968). Far from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, it may not stand. 408 U.S. at 101-102.

The principle of *Mosley* has consistently been reaffirmed by this Court. *E.g., First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785 (1978); *Hudgens* v. *NLRB,* 424 U.S. 507, 520 (1976); *City of Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175-176 (1976).

Mosley is ''on all fours'' with this case. The Illinois statute prohibits picketing before or about the residence or dwelling of any person—but it excepts from that prohibition picketing a residence which is also a place of employment involved in a labor dispute.[3] Appellant concedes

[3] The statue also makes exception for picketing a residence used as a place of business, one's own residence, and a residence which is ''the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.'' Holding the labor distinction not severable from the remainder of the statute,

(footnote continued)

that this exception applies to residences which are not also places of business, see Brief for Appellant at 7, and that the exception applies only to labor picketing. *Brown* v. *Scott, supra,* 602 F.2d at 792 n.1. Thus, a residence may be picketed to protest the resident's labor policies but not to protest his policies on civil rights. Substitute ''school'' for ''residence'' and this case is identical to *Mosley.*

A. THE STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE THERE IS NO COMPELLING STATE INTEREST WHICH JUSTIFIES THE STATUTE'S EXCEPTION FOR LABOR PICKETING.

In spite of *Mosley,* the state attempts to justify its discriminatory scheme on the ground that the interest the statute seeks to protect—quiet enjoyment of the home—is different from the interest the ordinance protected—quiet classrooms. This distinction is wholly immaterial insofar as equal protection is concerned: the issue here is not whether the right to quiet enjoyment of the home is a compelling reason for prohibiting *all* residential picketing,[4] but simply whether it is a compelling reason for allowing residential picketing about labor issues and prohibiting

(footnote continued)

the court of appeals did not consider the constitutionality of the other exceptions. *Brown* v. *Scott,* 602 F.2d 791, 795 n.6. Because the court of appeals limited its opinion to the constitutionality of the labor exception, Appellees will so direct their discussion in this section; however, the arguments against the labor exception also apply to the other exceptions in the statute.

[4] *Cf. Grayned* v. *City of Rockford,* 408 U.S. 101 (1972) (all disruptive noises can be prohibited at a school); *Adderley* v. *Florida,* 385 U.S. 39 (1966) (all picketing can be prohibited at a jail).

residential picketing about all other issues.[5] Clearly, it is not.

Nevertheless, the state argues that by bringing a domestic employee into his home the resident converts it from a "residence" into a "place of employment" and thereby waives his right to quiet enjoyment of the home as far as labor picketing is concerned.[6] This is a distinction without any principled basis in reality. By analogy, a school which employs teachers, rather than using volunteers, could be labeled a "place of employment" rather than a "school" in order to justify an exception favoring labor picketing alone. Purely nominal distinctions such as these can be made to justify almost any form of discrimination.

Since the regulation of expressive conduct is involved, however, the statute's preference for labor picketing must be carefully scrutinized to see if there is a compelling state interest to justify the discriminatory treatment. *See Police Dep't of Chicago* v. *Mosley, supra,* 408 U.S. at 98-99; *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 217 (1974). Illinois' selective exclusion of all but labor picketing cannot survive even the "rational basis" test.[7] A few common sense examples show that, even if employing a domestic could be regarded as constituting conversion to a "non-residential" use, there is no reason—certainly no compelling reason—for allowing picketing about that use and prohibiting picketing about other equally "non-residential" uses.

For instance, if employing a domestic is a "non-residential" use of one's home there is no rational or compelling reason why displaying a political candidate's poster in the window of one's home is not also a "non-residential" use. But Illinois does not permit a picketer to carry an opposing candidate's campaign poster on the public sidewalk in front of that home. Similarly, there is no rational or compelling reason why keeping pets in one's home does not constitute a "non-residential" use. But the Anti-Cruelty Society is prohibited from picketing the homeowner if he mistreats his pets.

Under the Illinois scheme, a janitors' union can picket a residence to persuade the owner to hire a janitor,[8] a

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[5] Amicus Curiae New England Legal Foundation suggests that a basis for the labor/non-labor discrimination is a First Amendment right of the domestic employee to picket where he works about labor issues. Brief of Amicus Curiae New England Legal Foundation at 10. The simple answer to that contention is that the Illinois statute does not give a forum to the employee alone. *See* n. 8, *infra.*

[6] Appellant frames the issue, "Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes, but permits limited picketing of homes used for non-residential public purposes?" Jurisdictional Statement for Appellant at 4. This formulation does not fairly present the question because it assumes what must be demonstrated, *viz,* that a private residence which makes use of domestic help is ipso facto being used for "non-residential public purposes". The very term *domestic* belies the argument. The issue properly framed is "Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes—except labor picketing?"

[7] The statute's exception for labor picketing is clearly not a simple time, place and manner regulation which brings about only an "incidental" abridgment of speech. Even if it were, however, "weighty" reasons would be required to justify the regulation. *See Konigsberg* v. *State Bar,* 366 U.S. 36, 69 (1961) (Black, J., dissenting).

[8] See Chicago Sun Times, May 12, 1978, at 96, App. at 21a-22a. It should be noted that the Illinois statute does not simply provide a forum for employees to picket; the union can picket even if the homeowner and the janitor do not want it. *See AF of L* v. *Swing,* 312 U.S. 321 (1941). Moreover, the union could presumably picket the homeowner even if the place of business of the janitor's employer were elsewhere. Cf. *Point East Condominum Owners Association, Inc.,* 193 NLRB 6 (1971).

teamsters' union can picket a residence to protest the non-union status of the occupant's chauffeur, and both unions can picket about which has jurisdiction. But a local neighborhood preservation group cannot peacefully picket a residence which is also a landmark to protest its proposed alteration, and a civil rights group cannot peacefully picket the residence of a person who is engaged in "blockbusting" in that neighborhood. However, as long as the picketing is peaceful, there is no reason for allowing labor picketing and prohibiting non-labor picketing,[9] *Police Dep't of Chicago* v. *Mosley, supra,* 408 U.S. at 100, and to do so is "an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment. 408 U.S. at 98; *Cox* v. *Louisiana,* 379 U.S. 536, 581 (1965); *See also Niemotko* v. *Maryland,* 340 U.S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953); *Brown* v. *Louisiana,* 383 U.S. 131, 151 (1966) (White, J., concurring).

B. THE STATUTE VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS BECAUSE IT DISCRIMINATES SOLELY ON THE BASIS OF CONTENT.

Just as the statute violates the Equal Protection Clause by discriminating among pickets without a compelling reason, so it violates the First Amendment and the Equal Protection Clause by selecting those who may picket solely on the basis of the content of the messages conveyed. The words of Mr. Justice Black's concurring opinion in *Cox* v. *Louisiana, supra,* 379 U.S. at 581, quoted in *Mosley, supra,* 408 U.S. at 97-98, are equally applicable here:

[9] Interestingly, the Illinois legislature found that *"all* residential picketing, *however just the cause inspiring it,* [is disruptive of the right to quiet enjoyment of the home]." *Ill. Rev. Stat.* ch. 38, §21.1-1 (1977) (emphasis supplied).

> "[B]y specifically permitting picketing for the publication of labor union views [but prohibiting other sorts of picketing], [the state] is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on the streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments."

The government simply may not select what matters of public interest may be discussed in public. *Police Dep't of Chicago* v. *Mosley, supra,* 408 U.S. at 96;[10] *Hudgens* v. *NLRB,* 424 U.S. 507, 520 (1975). This is "censorship in a most odious form."

Young v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976) (opinion of Stevens, J.), relied on by Appellant, does not in any way weaken *Mosley's* applicability to this case. In *Young,* a restrictive zoning plan which applied only to theatres exhibiting "adult" films was held constitutional on the ground that the ordinance preserved the character of urban neighborhoods. An analogy between *Young* and this case might be drawn if the Illinois statute prohibited all residential picketing which, for example, involved carry-

[10] The passage from *Mosley* at 96 cited by Appellant at pp. 10 and 11 of his brief does not give support to "a content-related scheme of selective exclusions of picketers." It merely says that discrimination among picketers will be carefully scrutinized *even* where such selection is compelled by conflicting demands on the same place. Clearly this refers to traffic-type regulations that attempt "no regulation at all of the content of speech and which [are] neither openly nor surrepititiously aimed at speech . . . ." *Konigsberg* v. *State Bar,* 366 U.S. 36, 69 (Black, J., dissenting). *See generally* Kalven, *Cox* v. *Louisiana: The Concept of the Public Forum,* 1965 Sup.Ct. Rev. 1, 29, quoted in *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 67 n. 27 (1976) (opinion of Stevens, J.).

ing erotic or sexually provocative signs or signs bearing scatological language. *See also FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1977); *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970). *But see Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1974); *Cohen* v. *California,* 403 U.S. 15 (1971). No proper analogy can be drawn here, however. The ordinance in *Young* would certainly not have been upheld if it had barred the showing of all films except those which concerned labor disputes. In this regard, *Young* reaffirmed *Mosley*:

> If picketing in the vicinity of a school is to be allowed to express the point of view of labor, that means of expression must be allowed for other points of view as well.[11] 427 U.S. at 64.

Thus, if labor picketing is allowed in the vicinity of residences Appellees also must be allowed to express their point of view by picketing there.[12]

[11] It makes no difference if the infringement on free discussion of public issues is framed in terms of "speakers," "subject matter," "issues" or "viewpoint". The ultimate evils are the same: certain issues are not discussed and the expression of certain viewpoints is foreclosed. *See First Nat'l Bank of Boston* v. *Bellotti,* 435 U.S. 765, 784-786 (1977); *City of Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175-176 (1976); *see generally* Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions,* 46 U.Chi.L.Rev. 81 (1978).

[12] Of course, there would be no merit to the argument, and Appellant does not advance it, that the labor exception is permissible because public streets fronting on private residential property become "private" for First Amendment purposes. *Cf. Evans* v. *Newton,* 382 U.S. 296 (1966). Moreover, even under such an analysis the state could not permit picketing related to the use of property and prohibit picketing not related to its use. *See Hudgens* v. *NLRB,* 424 U.S. 507, 518 (1976). Assuming *arguendo* the First

(footnote continued)

C. APPELLEES HAVE STANDING TO RAISE THE EQUAL PROTECTION AND REGULATION OF CONTENT ARGUMENTS.

In the instant case, Appellees are prohibited from picketing elected public officials at their homes about the officials' positions on political issues of local, neighborhood significance. A union, on the other hand, would be allowed to picket the homes of the same officials if the officials used non-union crews to make campaign film shorts in their living rooms. The court of appeals held, *Brown* v. *Scott, supra,* 602 F.2d at 794, and Appellant does not dispute in this Court, that Appellees have standing to raise the issue that labor picketers are granted a public forum denied to them.

The district court thought Appellees had no standing to argue the labor exception because the then mayor's residence was not shown to be a place of employment. *Brown* v. *Scott,* 462 F.Supp. 518, 534-535 (N.D. Ill. 1978). As the court of appeals held, that distinction is incorrect because the statute regulates residences, not places of employment. 602 F.2d at 793. Limiting picketing to a residence that is not a place of business but which is involved in a labor dispute is the same as allowing only labor picketing at purely private residences.

(footnote continued)

and Fourteenth Amendments did permit a state to prohibit picketing not related to a residence's use, an exception for labor picketing alone, and not for all other "related-use" picketing would not be permissible. *Cf. Lloyd Corp.* v. *Tanner,* 407 U.S. 551, 564 (1972) (where the subject matter of the handbilling was in no way related to the shopping center). In any event, the picketing here relates both to the public officials whose residences are sought to be picketed and to the residential areas themselves, since busing is a neighborhood issue.

In any event, the question of standing should not turn on the irrelevancy of whether Mayor Bilandic employed a gardener or chauffeur. As Appellant admits, Appellees wish to picket residences of various public officials about political issues that affect neighborhoods and they will be arrested and prosecuted under the statute if they do so. Moreover, the court of appeals ruled that this case should be certified as a class action, and Appellant has not appealed that ruling. Some of the residences Appellees and their class desire to picket are undoubtedly places of employment.

Certainly there exists a case or controversy between the parties which assures that the issues will be thoroughly examined. *See Baker* v. *Carr,* 369 U.S. 186, 204 (1962). And since the statute controls the content of speech, special regard for the First Amendment would give Appellees standing to raise the statute's facial invalidity even if it did not apply to them. *See Schaumburg* v. *Citizens for a Better Environment,* 48 U.S.L.W. 4162, 4165 (February 20, 1980).

II.

THE STATUTE VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS BECAUSE IT PROHIBITS ALL RESIDENTIAL PICKETING WHERE A NARROWLY TAILORED STATUTE REGULATING RESIDENTIAL PICKETING IS ALL THAT CAN BE JUSTIFIED.

In addition to violating the Equal Protection Clause by giving a preference to labor picketing, and the First Amendment by impermissibly regulating the content of speech, the Illinois Residential Picketing Statute is unconstitutional for another reason: it totally bans picketing on the public streets and sidewalks where a total ban is not the least restrictive alternative. The statute does not regulate picketing in terms of "time, place, and circumstance", *Police Dep't of Chicago* v. *Mosley,* 408 U.S. 92, 99 (1972); rather, it totally prohibits residential picketing except in the enumerated instances, where no restrictions are imposed. As the Maryland Court of Appeals said in holding a similar residential picketing statute unconstitutional, *Maryland* v. *Schuller,* 280 Md. 305, 372 A.2d 1076, 1081 (1977):

> The statute proscribes picketing even if it is peaceful and orderly, is quiet and non-threatening, is on public property, and does not obstruct persons and traffic. The ban applies regardless of the time of day the picketing takes place. While picketing and parading and the use of the streets for such purposes is subject to reasonable time, manner and place regulation, such activity may not be wholly denied. *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969).

Such activity may not be wholly denied because picketing is a form of First Amendment expression, *Thornhill* v. *Alabama,* 310 U.S. 88 (1940), and the public streets and sidewalks are traditional public fora for First Amendment expression, *Hague* v. *CIO,* 307 U.S. 496 (1939), including the public streets and sidewalks in residential neighborhoods. *Gregory* v. *City of Chicago,* 394 U.S. 111 (1969); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). Legislation regulating the right to use public streets must be narrowly drawn, *Lovell* v. *Griffin,* 303 U.S. 444 (1938); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940), and the right to use the streets for communication of views "must not, in the guise of regulation, be abridged or denied." *Hague* v. *CIO, supra,* 307 U.S. at 515-516. The Court has repeatedly stressed:

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed

> in the light of less drastic means for achieving the same basic purpose. *Shelton* v. *Tucker* . . . ." *Buckley* v. *Valeo,* 424 U.S. 1, 238-239 (1975) (opinion of Burger, C.J.).

Appellant argues, nevertheless, that Illinois' interest in safeguarding the right to quiet enjoyment of the home justifies the state in prohibiting generally all picketing on the public streets and sidewalks in front of residences, even peaceful political picketing before the residences of elected public officials. The rationale upon which this argument is based is that the right of residents to be undisturbed by even "the classic expressive gesture of the solitary picket", *Grayned* v. *City of Rockford,* 408 U.S. 104, 119 (1972), outweighs the picketer's right to use the public streets and sidewalks in residential areas.

Nothing in the record, however, indicates that residential picketing results in any substantive evil that government has the right to prevent. And "in our system, undifferentiated fear or apprehension is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines School District,* 393 U.S. 503, 508 (1969); *Police Dep't of Chicago* v. *Mosley, supra,* 408 U.S. at 101. Indeed, the rationale upon which the total ban of other residential picketing is based is fatally impeached by the exception granted labor picketing.[13]

To be sure, the presence of an unwanted message outside one's residence might, at times, be slightly annoying.

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[13] *See generally* Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana,* 1965 Sup.Ct.Rev. 1, 29 ("If some groups are exempted from a prohibition on parades and pickets, the rationale for prohibition is fatally impeached.") quoted in *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 67 n. 27 (opinion of Stewart, J.).

Speech, however, is protected even when it is annoying. *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1948). The unwanted message can rather easily be ignored. *See Spence* v. *Washington,* 418 U.S. 405, 412 (1974); *Cohen* v. *California,* 403 U.S. 15, 21 (1971); *see generally* Haiman, *Speech* v. *Privacy: Is There a Right not to be Spoken to?,* 67 Nw. U.L.Rev. 153 (1972). Deliberate, scurrilous verbal or visual assaults might be proscribed. *See Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 210 n. 6 (1974), citing *Rosenfeld* v. *New Jersey,* 408 U.S. 901, 905-906 (1972) (Powell, J., dissenting). Thus, any undue annoyance associated with picketing that is not associated with the message can be eliminated by narrowly drawn time, place and manner regulations.[14] Therefore, it is unnecessary to resort to the total ban expressed in the present legislation.

A. THE RIGHT TO BE LET ALONE IN ONE'S HOME DOES NOT INCLUDE THE RIGHT TO IMPEDE THE FREE FLOW OF INFORMATION TO ONE'S NEIGHBORS.

Appellant's justification for a total ban on most residential picketing is based on the dubious proposition that "where conflicts arise between residential privacy and other rights—even exalted First Amendment rights—resi-

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[14] Appellees have always conceded that Illinois may constitutionally impose reasonable time, place and manner regulations on the use of residential streets and sidewalks for picketing. *See Cox* v. *New Hampshire,* 312 U.S. 569 (1941); *Poulos* v. *New Hampshire,* 345 U.S. 395 (1953). Thus Illinois can narrowly regulate the number of pickets and the hours during which they may picket; it may prohibit loud and raucous picketing and the use of offensive sound amlifying devices; it may prohibit pickets from interfering with traffic on the streets and sidewalks and from trespassing on private property.

dential privacy is generally protected above all else." Brief for Appellant at 15. The Court has often said, to the contrary, that First Amendment rights, while not absolute, must generally be afforded primacy. *E.g. Saia* v. *New York*, 334 U.S. 558, 562 (1948); *see generally* McKay, *The Preference for Freedom*, 34 N.Y.U. L. Rev. 1182 (1959). There is, on the other hand, no general constitutional right of privacy. *Whalen* v. *Roe*, 429 U.S. 589, 607-608 (1977) (Stewart, J., concurring).[15]

In any event, the Court has long recognized that a governmental interest in preserving residential tranquility will not justify restricting the free flow of information into residential neighborhoods.[16] As early as *Martin* v. *Struth-*

[15] *Cf. Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), "which upheld a zoning ordinance that restricted no substantive right guaranteed by the Constitution." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 84 n. 1 (1976) (Stewart, J., dissenting).

[16] There is no precedent for the proposition that the right to quiet enjoyment of the home includes the right to have peaceful picketers kept off adjacent public sidewalks, and the cases relied on by the state are inapposite. *Kovacs* v. *Cooper*, 336 U.S. 77 (1949), and *Grayned* v. *City of Rockford*, 408 U.S. 101 (1974), deal with loud, raucous, disruptive behavior. *Cox* v. *Louisiana*, 379 U.S. 559 (1965), *NLRB* v. *Fruit Packers Local 760*, 377 U.S. 58 (1964), and *Teamsters Union* v. *Vogt, Inc.*, 354 U.S. 284 (1957), involve picketing that has an illegal object. *Breard* v. *City of Alexandria*, 341 U.S. 622 (1951), concerns trespass with prior notice. *Adderley* v. *Florida*, 385 U.S. 39 (1966), *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), and *Greer* v. *Spock*, 424 U.S. 828 (1978), involve public property not traditionally regarded public fora. *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728 (1970), *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), all deal with "borderline" speech which, in *Rowan* and *Pacifica Foundation*, was actually set into the home. *Packer Corp. v. Utah*, 285 U.S. 105 (1932), involves commercial speech, which was then unprotected.

ers, 319 U.S. 141 (1943), the Court struck down an ordinance banning all door-to-door leafleting, although such activity actually involves going onto private property and knocking on the door, because "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society." 319 U.S. at 146-147; *cf. Saia* v. *New York*, *supra*.

More recently, in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1975), an injunction against pamphleteering in a neighborhood was overturned on the ground that it stopped the free flow of information to the public. There, leaflets relating to the respondent's real estate practices were distributed near his home—seven miles away from his office and business activities. The leaflets, some of which urged their readers to call the respondent at his home, were passed out to parishioners on their way to and from respondent's church and left at his neighbors' doors. 402 U.S. at 417. The Appellate Court of Illinois had upheld the injunction "on its belief that the public policy of Illinois strongly favored protection of the privacy of home and family from encroachment of the nature of petitioners' activities." 402 U.S. at 418. In overturning the injunction, this Court said:

> Any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity. . . . Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record. 402 U.S. at 419-420.

In *Linmark Associates, Inc.* v. *Willingboro*, 435 U.S. 85, 95 (1977), this Court held invalid an ordinance prohibiting "for sale" and "sold" signs on front lawns, because it impeded the free flow of information, even though the ordinance's purpose was to preserve the racially integrated

character of the community. And just this term, in *Schaumburg* v. *Citizens for a Better Environment,* 48 U.S.L.W. 4162 (February 20, 1980), this Court struck down an anti-solicitation ordinance which only indirectly interfered with the free flow of information. In so doing, the Court noted that the ordinance was not directed at the unique privacy interests of persons in their homes because it applied not only to door-to-door solicitors, but also to solicitation on the public streets and ways. 48 U.S.L.W. at 4166.

Like the injunction in *Citizens for a Better Austin* and the ordinance in *Citizens for a Better Environment,* the Illinois statute proscribes expressive activity, in this case even less intrusive than door-to-door solicitation, not just on private property but also on the public way. Since the purpose of peaceful picketing is almost always to educate third parties about a dispute between picketers and the picketed,[17] *see Thornhill* v. *Alabama,* 310 U.S. 88, 99 (1940); *AF of L* v. *Swing,* 312 U.S. 321 (1941), the effect of the statute is likewise to impede the flow of information.[18]

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[17] Plaintiffs alleged in their Amended Complaint, paragraph 4, App. 7a-8a, and in affidavits in support of their motion for summary judgment, Affidavits of F. Campbell, paragraph 6, and R. Brown, paragraph 7, App. at 18a, 20a, that they want to engage in residential picketing to demonstrate in Chicago neighborhoods their concern about the neighborhood issue of busing.

[18] Since leafleters can be required to obtain prior consent before going onto private property, *Breard* v. *Alexandria,* 341 U.S. 622 (1951), a total ban on residential picketing could effectively keep groups such as CAR from disseminating their ideas in residential areas. Moreover, leafleting is no alternative to picketing, which is less costly, requires fewer people to reach the same size audience and is more easily understood by the less educated. Also, picketing is less intrusive than door-to-door canvassing. *Cf. Schaumburg* v. *Citizens for a Better Environment,* 48 U.S.L.W. 4162, 4168 (February 20, 1980) (Rehnquist, J., dissenting) quoting Z. Chafee, FREE SPEECH IN THE UNITED STATES 406 (1954).

B. THERE IS NO ADEQUATE ALTERNATIVE FORUM FOR RESIDENTIAL PICKETING.

Despite the lack of a factual or legal basis for concludnig that the classic symbol of a solitary picketer interferes in any essentially intolerable way with the quiet enjoyment of the home, Appellant argues that the availability of alternative fora tips the balance in favor of a total ban on residential picketing. This argument has been rejected soundly in *Schneider* v. *New Jersey,* 308 U.S. 147, 163 (1939), where the Court said that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[19] Moreover, Appellant's argument ignores Appellees' right to address the particular audience they choose—in this case a local public official's neighbors—and the concomitant right of the neighbors to receive information.[20] Picketing, at a different location, such as city hall, is an inadequate alternative because the message would not reach the desired neighborhood audience.

Picketing at an alternative forum, such as city hall, is also inadequate because the picketing is less likely, in many cases, to attract the attention of the person whose policies are being picketed. The offices of public officials are often far above the street level. The picketers' message below

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[19] Any other rule would pave the way for Orwellian legislation confining religious activity to the churches and political picketing to arenas especially constructed for that purpose.

[20] The right to receive information is constitutionally protected. *See Lamont* v. *Postmaster General,* 381 U.S. 301, 305 (1965); *Virginia Board of Pharmacy* v. *Virginia Consumer Council,* 425 U.S. 748, 756-757 (1976). Appellees have standing to raise the First Amendment rights of their audience. *See Bates* v. *State Bar of Arizona,* 433 U.S. 350, 364 (1977).

goes unnoticed. In addition, if residential picketing gets better news media coverage than does picketing in other places, as the district court believed, 462 F.Supp. at 531, that is a further reason why alternative fora are not adequate. Furthermore, in many cases, even some involving public figures, alternative fora simply do not exist. For example, the only effective place to picket about the activities of the leader of a "mothers-against-busing" campaign may well be at her residence. Expressive activity is not removed from the protection of the First Amendment simply because it is intended to be effective. *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971).

III.

THE ILLINOIS RESIDENTIAL PICKETING STATUTE IS VAGUE AND OVERBROAD.

"[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). Such a statute is void-for-vagueness. *Smith* v. *Goguen,* 415 U.S. 566, 572 (1974). It violates due process because it does not inform what is commanded or forbidden, *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1939), and because it allows arbitrary and discriminatory law enforcement. *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969). The vague statute is overbroad if it can be construed as making criminal, conduct which cannot be constitutionally penalized. *Coates* v. *Cincinnati,* 402 U.S. 611, 614 (1971). Here, Appellant admitted that the statute "may be susceptible to possible overbroad applications." *Brown* v. *Scott, supra,* 462 F.Supp. at 534 n. 17.

Where a statute is capable of reaching speech, an even greater degree of specificity is demanded than in other

contexts. *Smith* v. *Goguen, supra,* 415 U.S. at 573; *Hynes* v. *Mayor of Oradell,* 425 U.S. 610, 620 (1976). Such is the regard for First Amendment freedoms that even a person whose own speech is unprotected has standing to challenge the constitutionality of a statute which seeks to prohibit protected speech. *Schaumburg* v. *Citizens for a Better Environment,* 48 U.S.L.W. 4162, 4165 (February 20, 1980); *see also* the eighteen cases cited in *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 59 n. 17 (1976). In this case it is clear that the deterrent effect on legitimate expression, including its deterrent effect on Appellees, is both "real and substantial", and that, given its many vague terms, the statute is not "readily subject to a narrowing construction" by the Illinois courts.[21]

The statute is vague, first, because "[t]he vague contours of the term 'picket' are nowhere delineated."[22]

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[21] Although this statute has been on the books almost thirteen years, there are no reported cases under it. If, as was the case with Appellees, the state routinely offers defendants charged under the statute "deals they can't refuse", it is unlikely the state's courts will ever have an opportunity narrowly to construe the statute. *Compare Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 216-217 (1974) *with Broadrick* v. *Oklahoma,* 413 U.S. 601, 615 (1973). Also, Appellees are not "hard-core" violators attempting to overturn criminal convictions by appealing to the hypothetical rights of third persons. Here, Appellees conduct was protected, they are not challenging their convictions, and they themselves are in danger of arbitrary and discriminatory enforcement. *Compare Parker* v. *Levy,* 417 U.S. 733 (1975) and *Young* v. *American Mini Theatre, Inc.,* 427 U.S. 50, 59 (1976) *with Wooley* v. *Maynard,* 430 U.S. 705, 712 (1977).

[22] *Compare* the Illinois Residential Picketing Statute *with* the public issue picketing statute held unconstitutional in *Medrano* v. *Allee,* 347 F. Supp. 605, 622-625 (S. D. Tex. 1972), *aff'd,* 416 U.S. 802 (1974).

Thornhill v. *Alabama,* 310 U.S. 88, 100-101 (1939). Would the president of CAR be in violation of the statute if he stood in front of the home of the mayor of Chicago without signs or leaflets of any sort, in silent protest of the mayor's failure to take a stand in favor of busing? Would it make any difference if he talked to people who came by? If he handed out leaflets? If he wore an armband to signify his protest or a T-shirt with "Busing, Yes" emblazoned on it? If he carried a placard? A sign on a stick? If he walked up and down instead of standing still?

Second, the statute is rendered both vague and overbroad by the terms *before or about.* The statute does not make clear, in terms of distance or otherwise, how far the ambit of its prohibition extends. Does it make any difference in the example above if the CAR president is on the public sidewalk or roadway as opposed to being on the mayor's property? If he is on private property next door to the official's house, but with the consent of the owner? Does he violate the statute if he is on the sidewalk and across the street from the mayor's house? If he is in a public park across the street? Under the words of the statute, he could be arrested for picketing in any of those places, although some are indisputably public fora. *See, e.g., Hague* v. *CIO,* 307 U.S. 496 (1939).

Third, the statute is vague because it makes no attempt to define *residence* or *dwelling.* Do the terms include a dormitory? A rooming house? A hotel? By prohibiting picketing "before or about the residence or dwelling of any person," does the statute prohibit the CAR president from carrying a sign on public property in front of city hall because a hotel or condominium is located across the street?

Fourth, the statute does not adequately clarify the phrase *when the residence or dwelling is used as a place*

of business. Does this exception apply only where the person being picketed uses the residence or dwelling as a place of business? Or does it mean that if the building in which the residence or dwelling is located also houses a place of business all picketing is permitted? For instance, if a public official lived across the street from city hall in a hotel with a restaurant in the lobby, could he be picketed at the hotel? If he lived in a hotel that did not house any separate business? If the mayor of Chicago owns a condominium or leases an apartment, does she live at a "place of business", so that civil rights picketing is allowed there? Or is only landlord-tenant issue picketing allowed? If the mayor has a business in her residence or dwelling, are all types of picketing allowed? Or only picketing related to the business? For instance, if the mayor runs a private law practice from her residence, can CAR picket there about the mayor's stand on busing? Or only concerning her legal services? And is the picketing allowed at all times? Or only during business hours?

Fifth, the statute is vague because it makes no attempt to define a *place of employment involved in a labor dispute.* Presumably, if the mayor's chauffeur went on strike, her house would be "a place of employment involved in a labor dispute." But if the city's striking firemen picketed her house, would it then be "a place of employment involved in a labor dispute"?

Sixth, the statute is rendered hopelessly vague by the phrase, *the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.* If an official's house has ever been used as the place of holding a meeting or assembly, may it be picketed from then on if subjects of general public interest are

commonly discussed on the premises? Or may the picket take place only while a meeting or assembly is in progress on the premises? What does "commonly used" mean? Does it make any difference if assemblies or meetings are regularly held on the premises as opposed to infrequently? What is the difference between a "meeting" and an "assembly"? Are private meetings included? How many people make up a "meeting or assembly"? What are "subjects of general public interest"? If the mayor regularly meets with a small group of political advisors at her home, may CAR then picket there about busing? Or must the picketing relate to the issues discussed at the meeting?

These hypotheticals are not far-fetched, borderline cases. They are typical unanswerable questions that might be asked of attorneys advising CAR and other groups about picketing various residences or dwellings in Illinois, including those of public officials. It does not tax the imagination to conceive that the language of the statute would be stretched to its limit if the picketers' message, or the picketers, were out of favor with the local police. This is the very arbitrariness due process seeks to avoid.

Certainly due process is offended where a statute is so vague that reasonable lawyers examining it cannot advise a client, to a reasonable degree of certainty, what conduct the statute prohibits. In this case the district court said (Transcript of July 26, 1978 at 17):

> We've got six lawyers here this afternoon, and I'm not sure any of us would be able to advise the client with any certainty as to just what conduct does violate this statute.

The statute is clearly void-for-vagueness.

CONCLUSION

Appellees have no quarrel with the proposition that "the homes of men . . . can be protected from noisy, marching, tramping, threatening picketers and demonstrators." *Gregory* v. *City of Chicago*, 394 U.S. 111, 125-126 (1969) (Black, J., concurring). The problem with the Illinois Residential Picketing Statute is that it prohibits not just "noisy, marching, tramping, threatening picketers" but all picketers—even the most peaceful—except labor picketers. The statue is thus both underinclusive and overinclusive. *See First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 793 (1977). In both instances it is not narrowly drawn to reach only certain specified conduct which impinges on a valid state interest. *See Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-151 (1969). As Mr. Justice Black said concurring in *Gregory* v. *City of Chicago, supra* at 124:

> Narrowly drawn statutes regulating the conduct of demonstrators and picketers are not impossible to draft. And narrowly drawn statutes regulating these activities are not impossible to pass if the people who elect their legislators want them passed. Passage of these laws, however, like the passage of all other laws, constitutes in the final analysis a choice of policies by the elected representatives of the people.

The Illinois legislature opted on the one hand for an indefensible preference for labor picketing, and on the other hand for an unjustifiable suppression of all other picketing. Because the statute is thus discriminatory, overbroad, and hopelessly vague, Appellees respectfully pray that the judgment of the Court of Appeals for the Seventh Circuit be affirmed, and that Appellees be awarded the costs of this appeal and reasonable attorneys' fees.

Respectfully submitted,

EDWARD BURKE ARNOLDS
MICHAEL P. SENG
Attorneys for Appellees

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-703

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Appellant,

vs.

ROY BROWN, et al.,

Appellees.

Appeal from the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR APPELLANT BERNARD CAREY

BERNARD CAREY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-5444,
Attorney for Appellant Carey.

PAUL P. BIEBEL, JR.,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

ELLEN G. ROBINSON,
Assistant State's Attorney,
Of Counsel.

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REPLY BRIEF FOR APPELLANT BERNARD CAREY

ARGUMENT

The Appellees, joined by the Roger Baldwin Foundation of ACLU, INC., as Amicus Curiae, raise two sets of arguments against the constitutionality of the Illinois Residential Picketing Statute. One set focuses on the distinction

drawn by the Statute between labor picketing at a place of employment and non-labor picketing; the other focuses on the overall balance the Statute strikes between the privacy interests of residents and the communicative interests of picketers. Appellant Carey urges, however, that neither the appellees nor the ACLU has presented a single case precedent or policy reason which requires striking the Illinois Residential Picketing Statute.

I.

THE STATUTORY DISTINCTIONS BETWEEN LABOR AND NON-LABOR PICKETING ARE CONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE.

A. The Illinois Residential Picketing Statute Is Constitutional Because It Treats Different Kinds Of Picketing Differently.

While attacking the distinctions the Illinois Residential Picketing Statute makes between labor and non-labor picketing, the appellees nevertheless agree with Appellant Carey that the constitutionality of these distinctions depends upon their relationship to the state's substantial interest in preserving residential privacy. Brief for Appellees at 8-9. But they assert that a resident's entitlement to privacy at home is not diluted only when the resident hires a domestic worker, but also when he displays a political poster, keeps a pet, or lives in a local landmark. Thus, the argument concludes, if labor dispute picketing regarding the domestic worker is allowed to disrupt residential privacy, the Equal Protection Clause demands that political picketing, picketing by the Anti-Cruelty Society and the like also be permitted. Brief for Appellees at 7-10.

However, the Equal Protection Clause "does not require things which are different in fact . . . to be treated in law as though they were the same." *Tigner* v. *Texas,* 310 U.S. 141, 147 (1940). We submit that the differences between labor picketing and the public issue picketing the appellees hypothesize are significant and justify the disparate treatment accorded them in the Illinois Residential Picketing Statute.

By the mere act of voluntarily making his home the situs of an employment relationship the resident does two things which adversely affect his entitlement to residential privacy. First, he brings an outsider into his home for employment purposes, thus diluting his right to privacy *vis-a-vis* that outsider. *See generally,* Brief for Appellant at 21-23. Secondly, he creates focused, substantive rights under federal law, *e.g., Thornhill* v. *Alabama,* 310 U.S. 88 (1940), as well as under Illinois law on behalf of his empoyee and interested others to picket the residence which is the situs of the employment relationship. *See* Ill. Rev. Stat. 1925, ch. 48, §2a, the Anti-Injunction Act, which generally prohibits enjoining labor dispute picketing at the situs of the labor dispute.* *E.g. Naprawa* v. *Chicago Flat Janitors Unior,* 315 Ill. App. 328, 43 N.E.2d 198 (1st Dist. 1942), *appeal dismissed* 382 Ill. 124, 46 N.E.2d 27 (Ill. Sup. Ct. 1942).

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* Ill. Rev. Stat., 1925, ch. 48, §2a, provides:
"No restraining order or injunction shall be granted by any court of this State, or by a judge or the judges thereof in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor, or from peaceably and without threats

(footnote continued on following page)

By contrast, the resident who simply displays a poster, keeps a pet or lives in a landmark cannot be shown to have engaged in a course of conduct by which he has voluntarily diluted his own privacy entitlement or created a single right on behalf of any third person which is sufficiently weighty to overcome the resident's general entitlement to be let alone at home.*

Therefore, if the Illinois Residential Picketing Statute accords less favorable treatment to public issue picketers who would picket a home than it does to labor picketers who would picket the home which is the situs of the employment relationship, it is because the rights of the two types of picketers are different. Accordingly the Statute is not unconstitutional simply because it treats things which are different in kind as different in law.

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* *Continued*
or intimidation recommending, advising, or persuading others so to do; or from peaceably and without threats or intimidabeing upon any public street, or thoroughfare or highway for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or to abstain from working, or to employ or to peaceably and without threats or intimidation cease to employ any party to a labor dispute, or to recommend, advise, or persuade others so to do."

* In a similar vein, the ACLU has argued that public officials, specifically the Mayor of Chicago, "waive" their entitlement to residential privacy "by voluntarily choosing to enter the public political arena." Brief for ACLU at 14-16. This assertion has no basis in law and represents unsound policy. Public officials, who give up so much of their personal privacy are entitled at least to privacy within their homes, a single, quiet area of retreat from the demands of their public lives. *See Gregory* v. *City of Chicago*, 394 U.S. 111 at 121-122 (1969) (Black, J., concurring); and *see generally* Kamin, *Residential Picketing*, 61 NWUL Rev. 177, 228-231 (1966).

B. The Illinois Residential Picketing Statute Is Constitutional Under *Mosely* And The Public Forum Doctrine.

The second, and most aggressive attack appellees and the ACLU level against the Illinois Residential Picketing Statute is that it is unconstitutional because under *Police Dep't of Chicago* v. *Mosely*, 408 U.S. 92 (1972), any regulation of picketing in a public forum is unconstitutional if the regulation is tied solely to "the nature of the message being conveyed." Brief for ACLU at 5; and generally at 3-10; Brief for Appellees 10-12. But this argument misstates the operation of the Illinois Residential Picketing Statute, overstates the holding of *Mosely* and mischaracterizes the public forum doctrine.

First, as amicus for Appellant, the New England Legal Foundation, so clearly explains, the choice the Illinois Residential Picketing Statute makes between labor and non-labor picketing is not tied to the message being conveyed alone; it is additionally and inextricably tied to the function of the target residence as a "place of employment." Accordingly, the Statute's distinction between labor and non-labor picketing ought to be viewed as place selective, and not content discriminatory. Brief for New England Legal Foundation at 7-11. It is important to note that the same cannot be said about the choice between labor and non-labor picketing in the *Mosely* ordinance. That choice did, indeed, depend solely upon the subject matter of the picketing, and not also the function of the target school as a place of employment, because every school is a place of employment. Thus, all schools were potential targets for labor picketing.

Secondly, as explained fully in our opening brief, *Mosely* did not create an absolute ban on content-related choices

among picketers. Brief for Appellant at 10-14. The ACLU suggests, however, that the Court's opinion in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975), supports its absolutist interpretation of *Mosely.* In *Erznoznik,* the City attempted to convince the Court to sustain an ordinance restricting drive-in theaters from exhibiting movies containing nudity by arguing that the ordinance protected the privacy interests of passersby. In striking the ordinance, the Court characterized it as a content regulation of speech, but did not end its analysis with this characterization. Rather, the Court noted that only two state interests—residential privacy and the protection of a captive audience—had ever been found sufficiently compelling to justify content regulations, and neither was actually served by the Jacksonville ordinance. In this case, by contrast, Appellant Carey has already demonstrated that both residential privacy and captive audiences are protected by the Illinois Residential Picketing Statute. Accordingly, *Erznoznik* strongly supports the position of the appellant, not the ACLU.

Appellees and the ACLU also urge that *City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976); *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978); and *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976), dismissed in their briefs as a "dirty words" case, all support their interpretation of *Mosely* as creating a *per se* rule against content-related regulations of picketing. As we have already shown, Brief for Appellant at 11-13, like *Erznoznik* each of these cases stands for the proposition that such regulations survive constitutional scrutiny if the distinctions they draw are shown to be narrowly tailored to advance a substantial state interest, a showing successfully made in *Young* but not in *City of Madison* or *Bellotti.*

Finally, the appellees, and the ACLU rely upon *Hudgens* v. *NLRB,* 424 U.S. 307 (1976), the decision which relieved owners of shopping centers from the burden of tolerating picketing on their private property. As the ACLU correctly notes, in substantiating its holding that a shopping center is not the functional equivalent of a municipality the *Hudgens* majority commented that if the shopping center were a public forum, its owner could not be constitutionally entitled to exclude Vietnam war protesters, *see Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972), but required to tolerate protesters against the center's businesses. *Hudgens* at 520-521. However, the logic of this argument does not compel the conclusion, suggested by both appellees and the ACLU, *see* Brief for Appellees at 12 and Brief for ACLU at 6-8, that the public forum doctrine rigidly demands that if a municipality allows picketing about one subject in a given area, it must necessarily allow picketing about all subjects there. Indeed, Professor Harry Kalven Jr., who is universally credited with devising the notion of the public forum for First Amendment activities, explicitly recognized that some topics may be simply "out of order" in some fora, and suggested that the Court develop its own Robert's Rules for determining which subjects may be appropriately raised in given fora. Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana,* 1965 Sup. Ct. Rev., 1 at 23-27. In illustration of this principle, suppose that the teacher who sought to speak at the open school board meeting described in *City of Madison, supra,* 429 U.S. 167, had attempted to deliver a lecture on the fall of the Roman Empire instead of addressing himself to the labor dispute which was the subject of the meeting. Surely neither Professor Kalven nor this Court would have protected the teacher's "right" to deliver the irrelevant lecture, despite the public forum aspect of the meeting. *Id.* at 176-177.

In short, the public forum doctrine is inherently flexible, and it requires that rules about communications in public places reflect *both* the objective of the communicator, as well as the nature and intended uses of the place of the communication and the place to which the communication is targeted. *E.g. Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 304 (1974). In this regard, Professor Kalven seems to suggest that special forum rules ought always to apply where, as here, a communication is directed to an unwilling listener in his home, as the home is generally not a public forum for any purpose.

> " 'Anyone who would thus irresponsibly interrupt the activities of . . . a home, does not thereby exhibit his freedom, Rather, he shows himself to be a boor, a public nuisance, who must be abated, by force if necessary.' Meiklejohn, *The First Amendment is an Absolute,* 1961 S. Ct. Rev. 245." Quoted in Kalven, *supra,* at 24-25.

We submit that the rules established by the Illinois Residential Picketing Statute, allowing labor picketing, but none other at target homes which are also the places of employment, are consistent with the public forum doctrine as conceptualized by Professor Kalven and applied by this Court.

II.

THE STATUTORY PROHIBITION OF RESIDENTIAL PICKETING IS CONSTITUTIONAL UNDER THE FIRST AMENDMENT.

A. The Appellees' Traditional First Amendment Arguments Are Distinct From The Equal Protection Problem Presented And Are Not Properly Raised At This Time.

Both the appellees and the ACLU have included lengthy arguments raising traditional First Amendment attacks

against the Illinois Residential Picketing Statute's broad prohibition of residential picketing. They each contend that if there is a right of residential privacy it is not sufficiently profound to outweigh the interests of residential picketers —at least not *peaceful* residential picketers picketing the homes of public officials. Brief for Appellees at 14-22; Brief for ACLU at 11-24. Appellees also argue that the Statute is facially vague. Brief for Appellees at 22-26. But we submit that these arguments are not properly raised at this time.

In striking the Illinois Residential Picketing Statute on equal protection grounds, the Seventh Circuit specifically declined to consider whether the Statute could survive a traditional First Amendment attack: ". . . the statute in its entirety must fall and *we need not consider the constitutionality of a prohibition of residential picketing. . . .*" *Brown* v. *Scott,* J.S. App. A p. 8a, n. 6 (emphasis supplied); and *compare Mosely, supra,* 408 U.S. 92, *with Grayned* v. *City of Rockford,* 408 U.S. 104 (1972). In consideration of the Seventh Circuit's limited ruling, we did not include a traditional First Amendment question along with the equal protection question presented for review by this Court. Accordingly it is not properly raised at this time. *NLRB* v. *Sears Roebuck & Co.,* 421 U.S. 132, 163-164 (1975); *Irvine* v. *California,* 347 U.S. 128, 129 (1954).

B. The Illinois Residential Picketing Statute Is A Reasonable "Place" Regulation Of Picketing.

Unquestionably, the equal protection problem presented in this appeal is closely related to the traditional First Amendment issues raised by appellees. As explained in Appellant Carey's opening brief at 10-11, in order to de-

cide the equal protection issue the Court must determine whether the state has a substantial interest in protecting residential privacy; and, if so, whether the statutory distinction between labor and non-labor picketing is tailored to serve that interest. *See, e.g., Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. at 71. In making these determinations it is necessary to examine the effect of residential picketing on residential privacy in order to test the reasonableness of the labor and non-labor distinction. *See* Brief for Appellant Carey at 20. But it is not necessary to determine whether, irrespective of the labor, non-labor distinction, the prohibition on residential picketing is a constitutional "place" restriction on First Amendment activity.

In other words, the Court *may,* but is *not required* to decide whether "the right of residents to be undisturbed by even 'the classic expressive gesture of the solitary picket', outweighs the picketer's right to use the public streets and sidewalks in residential areas." Brief for Appellees at 16 (internal citation omitted). However, this issue has been thoroughly and excellently briefed by the New England Legal Foundation, as Amicus Curiae in support of Appellant Carey. We will, therefore, not reiterate its arguments, but will limit our response to certain points raised by the appellees and the ACLU.

1. Neither This Appeal Nor The Illinois Residential Picketing Statute Concerns The Education Of Neighborhoods.

In this Court the appellees suggest, for the first time, that the purpose of the residential picketing is to educate the neighbors of the picketed resident, and that the Illinois Residential Picketing Statute is unconstitutional because it

impedes the flow of information into the neighborhood, much like the injunction against pamphleteering overturned by this Court in *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1975). Brief for Appellees at 17-20 and 21; Brief for ACLU at 14. But there is no evidence in the record that residential picketers, in contrast to pamphleteers or canvassers, seek to educate or affect anyone but the resident who is the target of their picketing. The appellees in this action represented to the trial court that they wished to picket the residence of the Mayor of Chicago to protest his position on busing (A. 6a, 14a, 15a, 18a, 20a). Not a single appellee represented that his purpose in picketing would have been to educate the Mayor's neighbors, for it is axiomatic that one pickets a public official to pressure him to act in accord with the picketer's goals. *See generally,* Kamin, *Residential Picketing,* 61 N.W.U.L. Rev. 177, 225-230 (1966-1967). The ACLU concedes as much in its argument that the Mayor's home is the only effective place to picket him, because he can ignore a picket at City Hall. Brief for ACLU at 22-24.

In any event, prohibiting residential picketing does not affect a protester's ability to educate a neighborhood. There are other, equally effective and inexpensive methods for disseminating information, including telephone and mailing campaigns, local newspaper articles and advertisements, and door-to-door leafletting, pamphleteering and canvassing. *See, e.g., Martin* v. *Struthers,* 319 U.S. 141 (1941); *Organization for a Better Austin* v. *Keefe, supra,* 402 U.S. 415. Contrary to appellees' assertion, Brief for Appellees at 20, each of these alternative methods is less terrorizing and intrusive than picketing. The resident who wishes to preserve his privacy can hang up on a phone call, *see FCC* v. *Pacifica Foundation,* 438 U.S. 726, 749

n. 27 (1978), disregard offensive mail or newspaper stories, or post signs to deter unwanted callers, *see Village of Schaumburg* v. *Citizens for a Better Environment,* 48 U.S.L.W. 4162 (February 20, 1980). But a resident has no effective way to interdict the uninvited picketer patrolling in front of his home, nor is he required to "draw his drapes" or "ignore" the annoying conduct. Brief for Appellees at 16-17; Brief for ACLU at 20. It is well established that unlike the captive audience on the street, the resident made captive by an unwanted communicator, however peaceful, does not bear the initial burden of turning away. *See, generally, FCC* v. *Pacifica Foundation, supra.*

2. The Statutory Exceptions To The Ban On Residen- Picketing Enhance The Constitutionality Of The Illinois Residential Picketing Statute.

Just this term in *Village of Schaumburg* v. *Citizens for a Better Environment, supra,* 48 U.S.L.W. 4162, the Court reiterated earlier suggestions that the right of residential privacy could sustain a narrowly drafted regulation of communicative activity. *Id.* at 4166. *See, e.g. Erznoznik* v. *City of Jacksonville, supra,* 422 U.S. 205; *Cohen* v. *California,* 403 U.S. 15 (1971). Nevertheless, the appellees and the ACLU assert that the right, if it exists, is insubstantial, as evidenced by the "parade of exceptions" which "fatally impeach" the Illinois Residential Picketing Statute. Brief of ACLU at 13 and 17-21; Brief of Appellees at 16. But the exceptions enhance the Statute, for overly broad restrictions on communications are generally disfavored, *e.g. Village of Schaumburg* v. *Citizens for a Better Environment, supra,* and the exceptions recognize carefully selected situations where the resident has elected to dilute his privacy. Brief for Appellant at 21-23.

C. The Illinois Residential Picketing Statute Is Not Unconstitutionally Vague.

1. The Appellees Are Hard-Core Violators Of The Statute And Are Therefore Precluded From Proving Its Facial Vagueness Or Overbreadth.

The appellees' final argument is that the Illinois Residential Picketing Statute should be stricken on the grounds that it is facially vague and concomitantly overbroad where its vagueness extends to areas of constitutionally protected speech. Brief of Appellees at 22-26.

As the Court has often explained, the vagueness doctrine reflects the requirement of procedural due process that criminal statutes give reasonable notice of the conduct prohibited so that would-be violators can conform their conduct to the law, and so that authorities responsible for enforcing the statutes not be vested with unfettered discretion. Where a regulation reaches conduct protected under the First Amendment, the doctrine of facial vagueness also acts to prevent any unnecessary "chilling effect" on free speech.

In recent years the Court has recognized two distinct categories of facially vague regulations. The first is where a challenged regulation by its own terms or as authoritatively construed applies without question to some activities, but its application to other activities is uncertain. The second category is where "the challenged statute is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971)." *Smith* v. *Goguen,* 415 U.S. 566, 577-578 (1974).

When a vagueness challenge falls into the first category, a person to whom the statute clearly applies—a "hard-core violator," so to speak—may not challenge the statute on the ground of facial vagueness. *Parker* v. *Levy*, 417 U.S. 733, 754-757 (1975); *Young* v. *American Mini Theatres, Inc., supra*, 427 U.S. at 59; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973). This limitation on the scope of the vagueness doctrine reflects the notion that one who has received fair warning from a statute of the criminality of his own conduct may not challenge the vagueness of the statute as it might hypothetically apply to others. *Parker* v. *Levy, supra*, 417 U.S. at 756.

It is obvious that the Residential Picketing Statute is not so vague that it specifies "no standard of conduct at all."* Whatever other conduct may fall within its ambit, no person of common intelligence could be left guessing whether patrolling in front of a home with picket signs violates a statute which prohibits residential picketing. *Cf., Connally* v. *General Construction Co.* 268 U.S. 385, 391 (1926). Therefore, if the statute is vague, it is only in the sense that while it clearly applies to some activity, its application to other behavior is uncertain.

The appellees in this action have sought to patrol in front of a citizen's house carrying picket signs. They are, therefore, individuals to whose conduct the Statute clearly applies—hard-core violators. Thus, even assuming some imprecision about the effect of the Statute on others, it is unquestionably applicable to these appellees, and, accordingly, under the rule of *Broadrick* v. *Oklahoma, supra*, 413 U.S. 601, they are precluded from claiming that the Statute is unconstitutionally vague on its face. The Court's rejection of the vagueness challenge to the statute construed in *Young* v. *American Mini Theatres, Inc., supra*, 427 U.S. at 59, applies with equal force in this case:

> "It is clear therefore that any element of vagueness in these ordinances has not affected these respondents. To the extent that their challenge is predicated on inadequate notice resulting in a denial of procedural due process under the Fourteenth Amendment, it must be rejected."

We also submit that the Illinois Residential Picketing Statute should not be declared facially overbroad because of some vagueness which might, hypothetically, be lurking around the Statute's perimeters, as the Court has declared that where, as here, "conduct and not merely speech is involved," a regulation should generally not be declared void for overbreadth except where its overbreadth is "both real and substantial as well, judged in relation to the Statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma, supra*, 413 U.S. at 615; *see also United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 580-581 (1973).

The appellees have not even sought to demonstrate that the potential scope of the Illinois Residential Picketing Statute has either a "real" or "substantial" effect on protected conduct by third persons. Presumably, circumstances could be imagined in which the Statute might deter protected picketing by others. However, no such circumstances are before the Court. Indeed, if such circumstances arose, an overbroad application of the Statute could be cured by a narrowing construction by the Illinois courts.

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* Examples of such pervasively vague statutes are those which prohibit conduct "annoying to persons passing by," *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971), or which prohibit treating the American flag "contemptuously." *Smith* v. *Goguen, supra*. 415 U.S. 566.

Erznoznik v. *City of Jacksonville, supra,* 422 U.S. at 216; *Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. at 59.*

In light of these considerations, the Court should not sustain the appellees' procedurally inappropriate attack on the Illinois Residential Picketing Statute.

2. The Statute Is Not Vague Because It Gives Reasonable Notice Of The Conduct Proscribed.

Even if despite *Parker, Broadrick, Young* and *Erznoznik,* the Court proceeds to consider the merits of the appellees' vagueness attack, the appellees still have not demonstrated that the operative terms of the Illinois Residential Picketing Statute are unconstitutionally vague. As noted above, the doctrine of vagueness is reflective of the procedural due process notice requirement. It is, therefore, a doctrine which is an outgrowth of jurisprudential notions of fundamental fairness. However, as the Court has emphasized:

> "It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Colten* v. *Kentucky,* 407 U.S. 104, 110 (1972).

* The Court is respectfully reminded that these appellees once had a singular opportunity to challenge the constitutionality of this Statute in the Illinois Courts; however, they chose knowingly and voluntarily to forego that opportunity by pleading guilty to criminal charges of violating the Statute (A. 6a-7a, 12a, 13a, 17a, 19a).

The appellees' facial vagueness attack has two aspects. The first focuses on the terms "picket," "before or about" and "residence or dwelling." Brief of Appellees at 23-24.* But to ascribe vagueness to the term "picketing" is nonsensical. Many cases involving conduct described as "picketing" have been before the Court in recent years, and although there may have been uncertainty as to how much constitutional protection the conduct was entitled to, *compare Thornhill* v. *Alabama, supra,* 310 U.S. 88, *with International Brotherhood of Teamsters* v. *Vogt, Inc.,* 354 U.S. 284 (1957), the Court has not had difficulty determining what picketing is. For example, in *Cameron* v. *Johnson,* 390 U.S. 611 (1968), the Court rejected a vagueness challenge to a statute which prohibited " 'picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress. . . .' " *Id.* at 616. Without even focusing on the term "picketing," which was not defined in the statute, the Court concluded that the "statute clearly and precisely delineates its reach in words of common understanding." *Ibid.* See also *Cox* v. *Louisiana,* 579 U.S. 559, 562 (1965).

Neither are the terms "residence or dwelling" vague in a constitutional sense. The Court has often adjudicated First Amendment challenges to state statutes which in-

* We would submit that the appellees' analytic approach to vagueness based upon hypotheticals in the manner of *Baggett* v. *Bullitt,* 377 U.S. 360, 368-370 (1964), is outdated and unhelpful, because the Court no longer analyzes vagueness by resorting to farfetched hypotheticals. *E.g. Grayned* v. *City of Rockford,* 408 U.S. 104, 110 n. 15 (1972); *cf., Smith* v. *Goguen, supra,* 415 U.S. 566.

cluded the term "residence" without commenting on its vagueness. *See e.g., Martin* v. *Struthers, supra,* 319 U.S. 141, *Breard* v. *City of Alexandria,* 341 U.S. 622 (1951). These terms are commonly used in state burglary statutes without rendering them unconstitutionally vague, and they have recognized, precise meanings within the common law of Illinois. *Ezyhorski* v. *Kroska,* 21 Ill. App.3d 79, 84 (1st Dist. 1971).

Finally, "before or about" as used in the Statute to denote proximity are also words of common understanding. They are indistinguishable from the terms "near" or "adjacent" which have both withstood vagueness attacks in First Amendment cases. *Cox* v. *Louisiana, supra,* 579 U.S. at 568-569; *Grayned* v. *City of Rockford, supra,* 408 U.S. at 104. Indeed, couching the proximity limitation in a general term such as "before" or "near" avoids overbreadth problems raised by anti-picketing statutes which set specific foot limitations. *See, e.g., Medrano* v. *Allee,* 347 F. Supp. 605 (S.D. Tex. 1972), *aff'd in part, vacated in part* 416 U.S. 802 (1974).

The second aspect of the plaintiffs' vagueness challenge focuses on the scope of the exceptions to the general prohibition of residential picketing. The appellees have conceded that this appeal is only concerned with the exception for picketing "a place of employment involved in a labor dispute." Brief for Appellees at 6, n. 3. This labor dispute exception must be read in conjunction with the Illinois Anti-Injunction Act, Ill. Rev. Stat. 1925, Ch. 48, §2a, which generally prohibits enjoining picketing in conjunction with "labor disputes." This statute has been construed and applied literally dozens of times, and by now the permissible scope and locations for labor dispute picketing are so well settled as to preclude any finding of vagueness in the "labor dispute" exception to the Residential Picketing Statute.

As to the place of business and public meeting exceptions, we submit that this is not the appropriate vehicle in which to test their vagueness. The appellees have not alleged that they were ever adversely affected by asserted imprecisions in these exceptions, and, as the district court held in *Brown* v. *Scott,* J.S. App. B, 28a-31a, their general intendment is reasonably clear. Under these circumstances, and pursuant to the holding of *Broadrick* v. *Oklahoma, supra,* 413 U.S. at 613 and 615, these exceptions should not be declared facially and fatally vague in this action.

In sum, the Residential Picketing Statute gives adequate warning of which activities it proscribes, and it sets out reasonably explicit standards for those who must apply it. As the Court has repeatedly emphasized in vagueness cases, "there are limitations in the English language with respect to being both specific and manageably brief." *Letter Carriers, supra,* 413 U.S. at 580. Certainly, where, as here, the action was initiated by persons who knew that the conduct in which they desired to engage was prohibited by the Statute they were attacking, the Statute should not be stricken for unconstitutional vagueness.

CONCLUSION

For all the reasons stated herein and in Appellant Carey's opening brief, as well as for the reasons given in the briefs of Amici Curiae in support of Appellant Carey, we urge

that the decision of the Seventh Circuit be reversed, and that this Court hold the Illinois Residential Picketing Statute constitutional.

Respectfully submitted,

BERNARD CAREY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-5444,

Attorney for Appellant Carey.

PAUL P. BIEBEL, JR.,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

ELLEN G. ROBINSON,
Assistant State's Attorney,

Of Counsel.

March, 1980

FOR ARGUMENT

No. 79-703

In the
Supreme Court of the United States
OCTOBER TERM, 1979

BERNARD CAREY, as State's Attorney of Cook County, Illinois,

Appellant,

vs.

ROY BROWN, et al.,

Appellees.

Appeal from the United States Court of Appeals for the Seventh Circuit.

BRIEF AMICUS CURIAE OF ROGER BALDWIN FOUNDATION OF ACLU, INC.

HOWARD EGLIT
KAREN POPEK
DAVID GOLDBERGER
Roger Baldwin Foundation
of ACLU, Inc.
5 South Wabash Street
Suite 1516
Chicago, Illinois 60603

The Scheffer Press, Inc.—(312) 263-6850

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BRIEF AMICUS CURIAE OF ROGER BALDWIN FOUNDATION OF ACLU, INC.

INTEREST OF THE AMICUS CURIAE*

The Roger Baldwin Foundation of ACLU, Inc., is a non-profit, non-partisan organization dedicated to the defense and affirmative protection of the constitutional rights of all persons. It is actively engaged, through litigation, education, and other pursuits, in furthering and vindicating those rights, particularly First Amendment rights, whenever threatened.

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* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

The instant case involves a state law which suppresses constitutional guarantees affecting and governing the rights of freedom of speech and freedom of the people peaceably to assemble and to petition for redress of grievances. Defendant on his appeal challenges and seeks to overturn the Court of Appeals' decision invalidating that statute. *Amicus* believes that the ruling of the Court of Appeals was correct and appears here because of its conviction that only affirmance of that decision will vindicate the First Amendment rights of plaintiffs and all other persons.

SUMMARY OF ARGUMENT

This case, dealing with disparate treatment of picketers in the public forum, is directly governed by *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972). That decision, as well as rulings by this Court both before and since its being handed down, outlaw content-based regulation of protected speech—the vice perpetrated by the statute at issue here.

Even were some regulation of protected speech on the basis of content constitutionally permissible in some circumstances, that regulation is not tolerable here. The numerous exceptions built into the anti-residential picketing statute foreclose the state's claim that householders' privacy interests are served by the law. Moreover, the object of the picketing in this case—the mayor of the City of Chicago—has lesser privacy interests than do private citizens. In any event, there is no 'right' of residential privacy which overrides the First Amendment. Nor does the claimed availability of alternative sites for picketing mitigate the First Amendment and equal protection rights of the picketers to employ the forum they chose—the sidewalk in front of the mayor's residence.

ARGUMENT

I. INTRODUCTION.

The issues now before this Court are hardly novel; indeed, the parallels between *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), and the instant case are striking. As there was in *Mosley,* so there is here a statute banning picketing at a certain locale. As in *Mosley,* so too here the ban is relaxed in certain circumstances. Both in *Mosley* and here, the critical exception to the ban turns on the nature of the speech uttered by the picketers: in both settings, picketing is allowed when engaged in in pursuit of labor disputes.

A unanimous Court rejected the claim to constitutional legitimacy made for the statute in *Mosley,* with seven Justices joining in the majority opinion. Unless this Court, only eight years later, is now prepared to turn its back on that ruling, a like disposition must follow here. Because *Mosley* was decided in such an eminently correct manner, and because the statute at stake here and the fact situation here so closely track their counterparts in that case, a departure today from *Mosley* could only be described as devastatingly wrong.

II. POLICE DEPARTMENT OF CHICAGO V. MOSLEY CONFIRMS THE UNCONSTITUTIONALITY OF THE ILLINOIS STATUTE, WHICH REGULATES SPEECH ON THE BASIS OF ITS CONTENT.

Police Department of Chicago v. *Mosley* addressed the constitutionality of a Chicago ordinance which prohib-

ited all picketing within 150 feet of a school while the school was in session, but which excluded from this ban peaceful picketing arising out of labor disputes. Mosley, a peaceful picketer, had been arrested for protesting a high school's allegedly racially discriminatory policies.

Because the *Mosley* ordinance provided disparate treatment for different picketing, the Court utilized the Equal Protection Clause of the Fourteenth Amendment as its basis for analysis. Since, however, First Amendment interests were obviously "closely intertwined," 408 U.S. at 95, the Court primarily discussed First Amendment values and relied upon First Amendment decisions as guiding authority. In both equal protection and First Amendment terms, the anti-picketing ordinance in *Mosley* could not withstand constitutional scrutiny, the Court concluding, at 95-96:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. . . . The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . .
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> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembly or speaking on the basis of what they intend to say.[1]

In brief, content-based regulation, parceling out the public forum only to those speakers with whom government is in accord, is forbidden.

The *Mosley* Court's language prescribes the ruling which must follow here. The Illinois statute at issue bans residential picketing, save in the instance of "peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general interest." Ill.Rev.Stat., ch. 38, §21.1-2. The sole basis, then, for the determination of whether allowable picketing of a residence is occurring is the nature of the message being conveyed: if the activity follows from a labor dispute, arising out of employment within or related to the house being picketed, the activity is sanctioned. If the picketing is designed to convey a message of broader social significance, it falls under the proscription of the

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[1] Mr. Justice Stevens, writing for a plurality in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 65 (1976), expressed concern that this passage from *Mosley*, if "read literally and without regard for the facts of the case in which it was made, would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication." Indeed, that comprehension of *Mosley* is correct: content-based regulation *is* forbidden by the First Amendment. But, in any event, here the record is clear that the appellees were seeking to speak on public issues of significant social concern. Thus, certainly the *Mosley* language, "read . . . [with] regard for the facts of the case in which it was made" and with regard to the facts of the instant case, can generate no trepidation based on a perceived misuse of the 1972 decision.

statute. *Mosley* simply does not tolerate such a disparity of treatment.

In reaching this obvious conclusion, it is both easy and appropriate to set aside one correlative, but important, matter to which the *Mosley* Court adverted—e.g., the question of whether there is indeed a public forum even in existence. At first blush, that question evokes the familiar answer articulated by Mr. Justice Roberts in *Hague* v. *CIO,* 307 U.S. 496, 515-516 (1939), setting forth the streets and parks as being from time immemorial dedicated to the public use. But even that broad reading of the public forum can comprehend the fact that situations may exist where a portion of the public arena—at first appearance seeming to be an apt part of the forum available for public debate—is arguably subject to being removed from the speaker's use. *See, e.g., Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974); *Cox* v. *Louisiana,* 379 U.S. 559 (1965).

Here, however, there is clearly no basis for doubting that the streets and sidewalks in residential areas have been opened to picketers' use. For on its face, the Illinois statute recognizes that some speakers, at least, may commandeer the environs of a house for their picketing, i.e., picketers of homes involved in labor disputes and of homes employed as places of meeting or assembly. Having admitted statutorily that residences are appropriate sites for peaceful picketing, the state cannot then mandate that only certain picketing—defined by the message conveyed—shall be tolerated in that setting. That much *Mosley,* as already noted, teaches. *See also People Acting Through Community Effort* v. *Doorley,* 468 F.2d 1143, 1146 (1st Cir. 1972).

In sum, because *Mosley* so trenchantly outlaws content-based regulation which cuts into First Amendment exercises, the statute here—struck down by the Court of Appeals—should not be resurrected by this Court. Because the activity engaged in, and the message conveyed, by the appellees here is so firmly in accord with that " 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' " which the *Mosley* Court endorsed, 408 U.S. at 96, any ruling against the appellees would squarely assault the First Amendment. And because the Illinois statute at issue itself confirms that the streets and sidewalks surrounding residences are a part of the public forum, any belated *post facto* argument to the contrary must fall flat.

III. THE GREAT BODY OF CASE LAW CONFIRMS THAT NEITHER THE FIRST AMENDMENT NOR THE EQUAL PROTECTION CLAUSE TOLERATES CONTENT-BASED REGULATION OF SPEECH.

Mosley hardly stands alone. Earlier cases, as indicated in *Mosley* itself, indeed supported the notion that the Equal Protection Clause, as well as the First Amendment itself, preclude content-based discrimination among speakers in the public forum. More importantly, perhaps, the Court has continued to acknowledge and enunciate this principle since *Mosley.*

In *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975), the Court held unconstitutional a city ordinance which prohibited drive-in movie theaters from exhibiting films containing nudity when the screen was visible from a public street or place. One of the city's proposed justifications for the ordinance was the protection of the privacy of citizens against unwilling exposure to offensive

material. In response, the Court reasserted the *Mosley* principle that the state "may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. . . . But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Id.* at 209. The Court determined that the city ordinance discriminated against movies solely on the basis of content; such content discrimination could not be justified as being a means to prevent significant invasions of privacy. Chief Justice Burger, in dissent, rightfully characterized the Court's opinion as holding that, regardless of the circumstances, government may not regulate expressive activity on the basis of its content.

In *Hudgens* v. *NLRB,* 424 U.S. 507 (1976), the Court decided in effect that First Amendment rights were inapplicable to private shopping centers. However, the Court, relying on *Mosley,* reemphasized the principle that government may not in any circumstance discriminate on the basis of content in the regulation of expression in a true public forum. *Id.* at 520. More particularly, the Court reaffirmed the principle that *picketing* in a public forum cannot be selectively excluded on the basis of its message.

In another context later the same year, the Court relied heavily on the *Mosley* principle in holding that a school board could not constitutionally prohibit a teacher from speaking at an open public school board meeting. *City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976). Since the board had opened a forum for direct citizen involvement, it could not discriminate between speakers on the basis of the content of their

speech. *See also First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978).

Young v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976), does not undercut the appellees. There, the Court upheld a Detroit zoning ordinance which only restricted movie theatres exhibiting sexually explicit adult films. A plurality of the Court contended that the ordinance did not violate the Equal Protection Clause despite the fact that theaters were treated disparately, with the differentiation flowing from the content of the films being exhibited. Mr Justice Stevens, writing for this plurality, viewed the speech at issue as being of a uniquely low value, albeit nonetheless speech falling within the ambit of the First Amendment: "it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ." 427 U.S. at 70. Thus, the ordinance at issue was upheld, only trenching as it did upon such little valued speech.

Whatever broad implications *Young* may have in other contexts, here it simply does not serve to erode the press of *Mosley.* For one, there is the pragmatic fact that the plurality which adopted an at least two-tiered analysis of protected speech—with some speech clearly falling within the scope of the First Amendment to be accorded lesser protection than other speech—was not, after all, a majority. Mr. Justice Powell concurred, producing a majority of five for the judgment, but he made clear that he rejected the notion that "nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." *Id.* at 73. *Mosley's* majority view—rejecting content-based regulation—thus survived *Young,* as the Court's later reliance

upon it in *City of Madison, supra,* and *Bellotti, supra,* confirmed.[2]

Moreover, there can be no question that the speech here is of the very nature which the First Amendment clearly is designed to protect—political speech going to significant public issues of the day. Thus, even were one to embark upon the sort of content-directed analysis employed by the *Young* plurality, that analysis would lead to according appellee's speech the most stringent protection.[3]

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[2] Even accepting Mr. Justice Stevens' contention that it is after all necessary, and commonplace, to look to speech content to determine whether a given item of expression falls within the ambit of the First Amendment or outside its coverage, *Young, supra,* at 65-69, once it is clear that indeed speech is fully protected, no further content-based treatment can be accorded it.

[3] The majority in *Erznoznik, supra,* did indicate that selective restrictions on the basis of content have been upheld, when the speaker intrudes on the privacy of the home, *see Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970), or when the degree of captivity makes it impractical for the unwilling audience to avoid exposure, *see Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974). *Rowan* is discussed more fully below in terms of the alleged privacy justification for the Illinois statute. It is sufficient to note here that *Rowan* concerned a unique set of circumstances which involved the commercial advancement of material judged to be erotic or sexually provocative by the recipient, which did not prevent an initial communication, which had as a forum the mail rather than the public streets or sidewalks, and which involved a form of communication not readily regulatable by reasonable time, place, or manner restrictions. Moreover, government was being used as the mechanism to effectuate the intrusion upon privacy.

In *Lehman* the Court upheld the validity of a city's policy of barring all political advertisements from city buses while allowing commercial, nonpolitical advertise-

IV. APPELLANT VAINLY CONTENDS THAT CONTENT-BASED REGULATION OF SPEECH IS CONSTITUTIONALLY PERMISSIBLE.

A. Appellant Errs In The Test He Invokes.

Notwithstanding the haplessness of his task, defendant maintains that under *Mosley* a content-related scheme of selective exclusion of picketers is constitutional if it "furthers an important state interest and is carefully tailored to the contours of the particular interest being protected." App.Br., at 11. Not surprisingly, appellant errs.

The test advocated by the appellant is actually the standard, according to *Mosley,* by which content-neutral regulations based on the time, place and manner of picketing are to be scrutinized:

> We have continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests. . . . Similarly, under an equal protection analysis, there may be sufficient regulatory interests justifying selective exclusions or distinctions among picketers.
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> *Mosley, supra,* at 98.

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[3] (Continued)
ments to be displayed. Although the plurality and concurring opinions were concerned about the captive audience on a bus, the essential issue was whether the city had created a public forum and, having done so, thus was forbidden to discriminate on the basis of the subject matter of the advertising. The plurality opinion noted that the city bus system had never accepted any political or public issue advertising and thus no First Amendment forum had been created. 418 U.S. at 304. Here, of course, the streets have long been a forum; and, what is more, the statute itself recognizes them as a forum for picketing.

Such justifications for selective exclusions must be "carefully scrutinized" and "tailored to serve a substantial governmental interest." *Id.* at 99. But—and here is the juncture at which appellant goes astray—the Court continued in *Mosley,* at 99:

> In this case, the ordinance itself describes impermissibly picketing not in terms of time, place and manner, but in terms of subject matter. The regulation 'thus slip[s] from the neutrality of time, place and circumstance into a concern about content.' This is never permitted.

B. Even Were Some Regulation—In Some Conceivable Context—Allowable, It Would Not Be So Here.

For the sake of argument, one could pursue the contention made by the appellant—i.e., that some regulation is feasible under the Constitution, so long as the state has an important interest and that the statute deployed to pursue that interest is narrowly drawn. Even accepting the assertion as it stands, the statute at issue here fails to meet its measure. The state simply has no important interest—or at least it has no interest important enough to override the First Amendment interests of residential picketers. Nor, even assuming such an interest could be shown on the part of the state, is the statute sufficiently narrowly constructed.

1. The Statute's Own Exceptions Debunk The Privacy Interest Purportedly Being Served.

As an immediately dispositive matter, it is simple enough to point to the Illinois statute itself as demonstration of the sterility of appellant's position. The statute specifically permits "peaceful" picketing of residences, in several defined instances: when the picketing is pursued by

the owner of the house being picketed; when the picketing is directed to a residence which is "a place of employment involved in a labor dispute;" and when the residence is "the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest."

Given this parade of statutory exceptions, it is virtually an exercise in pushing a legal camel through a needle's eye to contend that somehow this Illinois statute serves an important state interest in protecting residential privacy. If indeed there were a privacy interest being served, the statute's own exceptions reveal how unimportant the state actually deems that interest to be. Alternatively, the exceptions may actually reveal that the state really does not perceive householders as having privacy interests—a revelation equally as devastating to appellant's argument here. Peaceful picketing to convey issues of broad social and political significance can hardly, simply by its content, intrude upon a non-existent privacy interest or, alternatively, create any greater disruption of privacy than does other peaceful picketing rendered acceptable under the statute.

In brief, the privacy argument propounded by the appellant is, simply on the basis of the statute itself, meritless. The logic of *Mosley, supra,* confirms this. The apt reasoning of the Court of Appeals below in this case confirms this. Indeed, the reasoning of this Court just this Term in *Village of Schaumburg* v. *Citizens for a Better Environment,* ..... U.S. ....., 48 L.W. 4162 (February 20, 1980), supports this conclusion.

In *Citizens for a Better Environment* the Court struck down as unconstitutionally overbroad a village ordinance which prohibited the door-to-door or on-street solicitation of contributions by charitable organizations that do not

use at least 75 percent of their receipts for charitable, non-administrative expenses. Charitable solicitations lie clearly within the protection of the First Amendment; among the justifications offered by the Village for its restriction of this protected expressive activity was its claimed interest in the residential privacy of its citizens.

The Court found this interest in residential privacy only indirectly served by the suppression of the solicitors' First Amendment activity because residents were disturbed equally by solicitors meeting the 75 percent requirement as by those who did not satisfy the requirement. 48 L.W. at 4166. Similarly, in the case at bar residents of a city will be equally disturbed—or not disturbed—by peaceful labor picketers in front of their dwellings as by peaceful non-labor picketers like the appellees. Additionally, the Court in *Citizens for a Better Environment* observed that the ordinance was not directed at unique privacy rights of persons in their residences since it also banned solicitations on public ways. In a sense there are similarly no unique privacy rights at issue here. Although picketing may be directed at a particular residence, picketers may also be attempting to communicate their message to neighbors and passers-by. Indeed, the appellees here wished to express their views on busing to the mayor's neighbors in order to stress the neighborhood character of the busing issue. (A. 18a, 20a). There is thus no unique residential privacy right served by the statute.

2. Public Officials Have A Lesser Claim To Privacy Than Do Private Citizens.

A second aspect of the case before the Court makes the privacy argument a particularly inapt one. The object of the picketing in this situation was the then-mayor of the City of Chicago. The message being conveyed focused on

the problem of segregated schools in the City—a problem which has received consistent media attention and, perhaps more importantly, consideration by the United States Department of Justice. There are a number of reasons why the statute, as applied to these appellees, who were picketing the home of a public official, is particularly offensive.

The statute recognizes, as must the appellant as well, that the state cannot foreclose residential picketing when the residence is also a place of employment and thus the locus of a labor dispute. Indeed the appellant concedes that "by the mere act of bringing a worker into his home, the resident voluntarily dilutes his entitlement to total residential privacy, and the state's interest in legislatively protecting that privacy logically diminishes *vis a vis* the worker and others who may wish to communicate with or about the worker." App. Br., at 22. In sum, "(a)llowing that worker or a labor organization to picket the resident when a labor dispute arises permits an intrusion upon residential privacy that the resident has invited upon himself." *Ibid.*

To the extent that this argument—embodying a notion of waiver of privacy interests by the object of the picketing—has any validity, it can only sustain the appellees in their attack upon the statute. For, by voluntarily choosing to enter the public political arena, the public official—specifically, the mayor of the City of Chicago—necessarily and properly chose to subject himself to the voters' scrutiny, to approbation by the public as well as censure. After all, a public official is exactly that—a *public* official. He too, then, sacrifices his claims to privacy.

This is not to suggest that public officials are totally exposed to the public eye, so that every private act is to

be unclothed for public discussion. It is to say, however, that if the appellant can seriously contend—in a desperate effort to save his privacy argument while also explaining the exception-ridden statute which purportedly protects privacy—that a consumer waives his privacy by employing a television repairmen who subsequently pickets his house because the consumer, dissatisfied with the job, refuses to pay the bill, then certainly all the more is it legitimate to conclude that a public official waives his privacy of the home by assuming a public office.[4] Thus, no important state interest can legitimately be said to be served here, by a statute which cloaks the public officer with undeserved protection, while leaving exposed the hapless householder who employed a subsequently disgruntled plumber or window-washer.[5]

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[4] In decisions concerning civil liability for defamation or the tortious invasion of privacy, the Court has indicated that the privacy claim of government officials and public figures is weaker than that of the ordinary citizen. *See, e.g., Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964. *Cf. Time, Inc.* v. *Hill,* 385 U.S. 384 (1967).

[5] It might be contended that even assuming the public official waived his right of privacy, his neighbors did not. And at least some of them might be disaffected by picketers outside their neighbor's house, in plain view of their own houses. This certainly is not a concern to appellant, who willingly concedes that labor picketing directed at a residence is acceptable. No more can it be a concern when it is the public official who is being picketed, and it is *his* neighbors who object. Their claim is no more valid than their complaint about anyone using the streets whom they do not like. The streets are a public forum, and personal idiosyncracies of homeowners, not the object of picketing, cannot close that forum. In any event, the statute is not narrowly drawn so as to except employers or public officials from its ban, while extending protection to their neighbors.

3. There Is No Right Of Residential Privacy Overriding The First Amendment.

Rowan v. *United States Post Office Dep't,* 397 U.S. 728 (1970), is a key case in appellant's argument. It proves to be a weak link on which to build a brief. The *Rowan* Court upheld a federal statute which provided a procedure whereby a householder who found to be "erotically arousing or sexually provocative" material offered for sale in advertisements received through the mail could request that all future mailings from that mailer be stopped. The Post Office would comply with that request.

From this decision appellant extracts the contention that the Court therein "established beyond cavil the right of residential privacy as endowing the resident with the power to censure all uninvited communications". App. Br., at 19.[6] The statement is so overblown as to be silly

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[6] The cases relied upon by the appellant for this overstatement simply do not support it. In *Cohen* v. *California,* 403 U.S. 15 (1971), the Court acknowledged that the "government may properly act in *many* situations to prohibit intrusions into the privacy of the home of unwelcome views and ideas which cannot be totally barred from the public dialogue. . . ." *Id.* at 21 (emphasis added). Not only did the Court refuse to say that *all* unwelcome communications can be banned from the home; it also refused to exclude messages directed into the home from the general test to be employed to determine whether the government may constitutionally ban such discourse —that there must be "a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Id.*

Erznoznik v. *City of Jacksonville,* 422 U.S. 205 (1975), also cited by the appellant, simply does not support the proffered statement at all. Rather, *Erznoznik* held that government may not selectively exclude certain speech from the public forum on the basis of its content. At most, *Erznoznik* refers to *Rowan* v. *United States Post*

on its face. A homeowner may be irritated by noisy children playing across the street, or by his neighbor's son's motorcycle, or by a fruit tree across the way which offends some peculiar bias against pears or peaches. The appellant would have it that inasmuch as each of these communications—the noise of the children, the noise and sight of the motorcycle, the sight and smell of the fruit tree—is uninvited, the householder has a constitutional right to "censure" it, whatever that means. No further exposition is needed on this point.

More sophisticated bases exist, as well, to demonstrate the narrowness of *Rowan,* and its irrelevance here. In *Rowan,* it was a government agency which was the mechanism for effectuating the intrusion into the home. The federal statute simply gave the homeowner the option to place that agency in a neutral position, by instructing the agency not to deliver the offensive material. Thus, *Rowan* did not involve a situation where government actively undertook to assert a privacy interest on behalf of the homeowner and thence punish anyone who infringed that interest. Rather, it simply sanctioned govern-

[6] (Continued)
Office Dep't, 397 U.S. 728 (1970), which the *Cohen* opinion also cited, as its one example in which the privacy interests of the home prevailed over unwelcome communications. *See Erznoznik, supra,* at 209. *Rowan,* however, did not forge a *per se* rule that all unwelcome communications can be barred from the home.

The final case relied on by the defendant, *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977), is simply inapposite. The Court observed that the ordinance at issue banning the display of "For Sale" signs in front of residences did not restrict a means of communication which intruded on the privacy of the home or which confronted a captive audience. *Id.* at 94.

ment standing aside from the speaker-listener relationship.

It was in *Martin* v. *City of Struthers,* 319 U.S. 141 (1943), that the Court addressed, and struck down, an activist government attempt to override the First Amendment in the name of privacy of the home. Here, as in *Martin,* there is an undifferentiated effort by non-neutral government to protect all homeowers, whether they desire that protection or not, from the assumedly intrusive messages which speakers seek to deliver. The Illinois statute does not parallel *Rowan,* then: there is no prior history here of government effectuating an intrusion, and government thence simply being requested to cease its support of that intrusion. Rather, the Illinois statute represents active governmental assault upon the First Amendment—an assault for which no precedent exists, and which *Martin* precludes.

This distinction between *Rowan* and the present case, apart from being obvious, is also significant. In *Rowan,* the statute allowed each individual to exercise his First Amendment right to not listen—a right as valuable as that of the speaker to speak. Here, in contrast, the statute casts the state in the role of censor; allows the state to presume that there are no willing listeners; and thence allows the state to punish all those who would speak (with the exception of certain, selected speakers upon whom the state, through its statute, has placed a beneficent hand). *Rowan* preserves First Amendment rights; the statute here destroys them.[7]

[7] It should also be noted that in *Rowan* the material involved was commercial speech concerning erotic material. At the time *Rowan* was decided commercial speech had not yet been declared to be within the ambit of the

Underlying the concern for the privacy of the householder is the perception that the homeowner is a captive audience, in a sense. He is the forced recipient of a message which he cannot escape. While the captive audience plight—as an abstract problem—is a sympathy-arousing one, it is not dispositive here. For unlike the bus passenger forced to submit to a speech from which there is no escape, *see, e.g., Public Utilities Commission* v. *Pollak,* 343 U.S. 451 (1952), or the home-dweller bedeviled by loud and raucous loudspeaker trucks whose intruding noise cannot be eluded, *Kovacs* v. *Cooper,* 336 U.S. 77 (1949), the object of residential picketing is free to censor the message he does not want to receive. He need only draw his drapes; he thereby can avoid the sight he dislikes. He is not being intruded upon in "an essentially intolerable manner." *Cohen* v. *California,* 403 U.S. 15, 21 (1971).

Moreover, it is not claimed here that the First Amendment extends beyond peaceful picketing—the type of activity engaged in by appellees here, in which no intrusive noise penetrates the household. Peaceful residential picketing, then, at most invokes the captive audience notion in theory; certainly it does not generate it in fact.

Apart from *Rowan,* the appellant also invokes *FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978). There the Court held that the Federal Communications Commission has the power to regulate a radio broadcast of words

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[7] (Continued)
First Amendment's protection, as it since has been. *See, e.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). Thus, the *Rowan* Court did not need to confront head on a clash between a protected speech claim and the householder's claim to privacy—a clash present here.

which are indecent, albeit not obscene. While the decision turned in part on the fact that the broadcast of indecent language intruded upon the audience in the privacy of their homes, 438 U.S. at 748-749, the medium of the communication was of overriding importance. "[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.* at 748. Picketing, on the other hand, has traditionally been afforded broad First Amendment protection. *See, e.g., Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *cf. Gregory* v. *City of Chicago,* 394 U.S. 111 (1969). In addition, the Court in *Pacifica Foundation* emphasized the narrowness of its holding and intimated that a similar broadcast presented at a different time of day might lead to a different result. *Id.* at 750.

The theoretical specter of the captive residential audience cannot justify the suppression of virtually all non-labor speech in residential areas. Nor can the privacy interests of homeowners provide constitutionally sufficient warrant for the Illinois statute.

4. Alternative Sites For Picketing, Even If They Existed, Would Not Cleanse The Statute Of Its Unconstitutionality.

One final aspect of the conflict between appellees' right of free speech and residents' privacy interests concerns the possibility of alternative forums for appellees' picketing. It is of course well settled that an appropriate use of streets and sidewalks for the exercise of First Amendment rights cannot be denied or curtailed merely because other sites are available. *Schneider* v. *State,* 308 U.S. 147, 163 (1939). *See also Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 556 (1975). Appellant nonetheless suggests that alternative sites are available to

appellees and that this should tip the scales for the claimed right of residential privacy. App. Br., at 20. *Schneider* and its progeny certainly foreclose such an argument. But even assuming *arguendo* that such analysis had some legitimacy, it is off the mark on its own terms here.

The streets and sidewalks of a city can truly be called the "poor man's printing press." *See Martin* v. *City of Struthers,* 319 U.S. 141, 146 (1943). At minimal cost, they provide those who can afford no other means of communication an opportunity to publicize their message. And, it is often those people who are most seriously aggrieved, and whose grievances most deserve publication, who are least able to afford meaningful expression of their complaints. *See* Comment, *Picketing the Homes of Public Officials,* 34 U. Chi. L. Rev. 106, 125 (1966); *cf. Martin* v. *City of Struthers, supra.*

Any suggestion that another part of this forum, away from the mayor's residence, would have been as meaningful for appellees' purposes simply does not square with reality. The only other feasible forum in this case would have been the sidewalk in front of City Hall, in which the office of the mayor of Chicago is located. Yet the public sidewalk in front of the residence of the mayor is both a more meaningful forum and a particularly necessary one. For expression of complaints such as those here to be meaningful, their communication must directly reach both the mayor himself and also the larger audience of citizens of Chicago.

Picketing in front of the mayor's residence can deliver plaintiffs' message to the mayor in a way that picketing in front of City Hall cannot even approximate.

There is a great likelihood that the mayor will not even see picketers or demonstrators in front of City Hall; he is often shepherded into and out of his office by policemen or bodyguards who shield him from seeing any demonstrations. He is generally given little opportunity to see and hear peaceful picketers and their message. He is insulated from the petitions of the poor and the powerless who have no other means of effectively expressing their views to him.

Picketing in front of the mayor's residence, on the other hand, can impress him with the picketers' message in a singular way. The mayor cannot be protected by others from even knowing that complainants exist and that they have serious political and social views which they wish to express to him. Residential picketing allows these dissenters to emphasize to the mayor that his decisions and actions, or his indecision and lack of action, *as a public official,* continue to vitally affect the lives of his constituents even after he has left his formal place of employment. *See* Comment, *Picketers at the Doorstep,* 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 95, 106 (1974); Comment, *Picketing the Homes of Public Officials, supra,* at 126.

In this same vein, picketing in front of the mayor's home is the most effective means by which the speakers can broadcast their message to the citizens of Chicago and perhaps indirectly affect the mayor through them. By picketing at City Hall the picketers can only reach an audience of passers-by whose attentiveness to their message is doubtful at best. After a cursory glance at a picket sign, the passer-by generally forgets in a few moments the message of the sign he has just observed. More importantly, picketing at City Hall will seldom result in any news coverage by the news media. Such

demonstrations are simply too common to generate sufficient news-worthiness. In contrast, picketing at a public official's residence may well warrant media attention, and this in turn means that a great number of citizens will receive news of the picketers' message.

Alternatives aside, there are simply going to be occasions when the home is indeed the only available suitable forum for non-labor picketers. A slumlord, for example, whose daily business is unrelated to the properties he owns, could not be meaningfully picketed by tenants in his buildings at any place other than his residence. Picketing in front of his buildings themselves would never result in the tenants' message being delivered to an absentee landlord. Picketing at his place of employment, assuming that the tenants could determine where that was, would be utterly meaningless because of its lack of relation to the problem. Picketing in front of the slumlord's residence, on the other hand, in perhaps a 'better' part of town, would not only deliver the message of the tenants' grief and advocacy of change to the landlord but also to his neighbors, who may have been unaware of his practices but who may themselves now exert leverage on their neighbor to support the picketers' requests.

In sum, then, the suggestion that picketers have alternative fora, in which to picket, while the householder is a captive audience with nowhere to retreat, is specious.

CONCLUSION

For the foregoing reasons, as well as those set forth in plaintiffs-appellees' brief, the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

HOWARD EGLIT
KAREN POPEK
DAVID GOLDBERGER
Roger Baldwin Foundation of ACLU, Inc. Amicus Curiae.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-703

BERNARD CAREY, as State's Attorney
of Cook County, Illinois,
Appellant,

VS.

ROY BROWN, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

MOTION OF PACIFIC LEGAL FOUNDATION AND CLYDE W. CORNELL FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CLYDE W. CORNELL IN SUPPORT OF APPELLANT

RONALD A. ZUMBRUN
ROBERT K. BEST
ROBIN L. RIVETT
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amici Curiae Pacific Legal Foundation and Clyde W. Cornell

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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MOTION OF PACIFIC LEGAL FOUNDATION AND CLYDE W. CORNELL FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT

Pursuant to this Court's Rule 42, Pacific Legal Foundation (PLF) and Clyde W. Cornell hereby respectfully move the Court for leave to file their brief amicus curiae bound with this motion. Consent was sought from counsel for appellees who responded in the negative. Amici have received the written consent of counsel for appellant which has been lodged with the Clerk.

The accompanying brief urges this Court to reverse the decision of the Seventh Circuit Court of Appeals in *Brown v. Scott,* 602 F.2d 791 (7th Cir. 1979).

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of the State of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

Pursuant to Board authorization, PLF is currently representing agricultural employee Clyde W. Cornell in actions before the California Agricultural Labor Relations Board and the First District Court of Appeal for the State of California. Both actions were taken as a result of mass labor picketing which occurred at Mr. Cornell's home in Salinas, California, on Sunday morning, April 29, 1979. Nearly 40 members of the striking United Farm Workers of America marched, screamed, and yelled obscenities in front of Mr. Cornell's home terrifying his family and disrupting the tranquility of the entire neighborhood. Before the demonstration was ended by the police, 13 picketers had been arrested. The administrative and judicial actions taken on behalf of Mr. Cornell by PLF were initiated in an attempt to ensure that Mr. Cornell and his family would never again have the privacy and sanctity of their home so flagrantly violated.

PLF and Mr. Cornell strongly believe that municipalities must be permitted to adopt narrowly drawn statutes to protect their citizens' rights to privacy in their homes. Otherwise, brutal occurrences as that above referenced will continue. Accordingly, amici believe the action of the court below in setting aside the Illinois residential picketing statute will severely affect the general welfare of the people of this nation.

Amici consider the decision to be extremely significant as it interferes with the citizen's fundamental right to privacy in the home and the state's compelling interest in protecting that right.

Past Supreme Court decisions as well as federal and state court decisions have recognized and protected this fundamental right to privacy in the home when confronted with uninvited speech. The state's compelling need to protect both the right to privacy and right to free speech is undeniable; yet neither right is absolute. When these rights conflict, they must be weighed and balanced by the courts. It is the opinion of amici that the constitutionally protected privacy right in the home is superseding and, as such, was not properly considered or weighed. If it had, the court would have ruled the right to privacy in the home so compelling as to sustain the state's interest in adopting the subject statute.

PLF and Clyde W. Cornell, due to their unique perspective and experience concerning the protection of residential privacy interests, believe that they can provide this Court

with a more complete argument on the need to balance the important public interests at stake in this litigation.

DATED: February 21, 1980.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBERT K. BEST
ROBIN L. RIVETT

By ROBIN L. RIVETT
Attorneys for Amici Curiae
Pacific Legal Foundation
and Clyde W. Cornell

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 602 F.2d 791 (7th Cir. 1979).

The opinion of the district court is reported at 462 F. Supp. 518 (N.D. Ill. 1978).

QUESTION PRESENTED

Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes, but permits limited picketing of homes used for nonresidential public purposes.

ARGUMENT

THE CIRCUIT COURT COMMITTED CLEAR ERROR WHEN EVALUATING THE CONSTITUTIONALITY OF THE ILLINOIS RESIDENTIAL PICKETING STATUTE BY FAILING TO ASSIGN SUPERSEDING IMPORTANCE TO PROTECTION OF THE RIGHT OF PRIVACY IN THE HOME

The Illinois residential picketing statute at issue manifests the recognition of the state that protection of privacy in the home constitutes a compelling state interest which only the state has the serious capability and responsibility of ensuring by invoking its police powers. *See Kovacs v. Cooper,* 336 U.S. 77, 87 (1949). Amici emphatically assert that it is imperative that the state be permitted to exercise its responsibility to protect the residential privacy of its citizens, for without safeguarding statutes a resident is subject to the same frightening treatment amicus Cornell was subjected to when picketed by the United Farm Workers. *See* motion, *infra.*

Ironically, though, in exercising its protective police powers designed to ensure the privacy rights of its residents, the state is faced with a dilemma. On the one hand, it is warned not to draw the statute so broadly that other constitutional guarantees are impermissibly violated in the process. For example, the right to free speech must not be needlessly diminished when a narrower statute can adequately serve the same paramount governmental interest of protecting privacy. *See Martin v. Struthers,* 319 U.S. 141 (1943). On the other hand, the state is warned that if it does draw a statute narrowly so that due regard is given to all constitutional guarantees to ensure that none

is needlessly diminished in the process, the statute runs the risk of violating the Equal Protection Clause of the Fourteenth Amendment. *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972), bears witness to this fact. Illinois is caught in this dilemma by the judicial reasoning appealed from herein. Fortunately, the dilemma is artificial and avoidable, for the court should have allotted superseding weight to protection of residential privacy rights when it balanced the constitutional interests impacted by the statute. The right of privacy in the home has been accorded superseding weight by the courts when balanced against conflicting rights; yet the lower court totally ignored this precedence. This is clear error.

The right to privacy was firmly established as a constitutionally protected right by the Supreme Court in *Griswold v. Connecticut,* 381 U.S. 479 (1965). The Court articulated the "penumbra" of privacy rights found in the Constitution:

> "Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" *Griswold,* 381 U.S. at 484.

The right to be free from invasion of privacy encompasses the right to have one's home, family, and communal life protected from disruption. A clear line of case authority demonstrates that the privacy and sanctity of the home are to be given the highest safeguards against intrusive speech in a variety of factual settings.

In *Rowan v. United States Post Office Department,* 397 U.S. 728 (1970), this Court upheld the constitutionality of a federal statute which permitted a resident to have his name removed from mailing lists thereby prohibiting mail houses from sending mailings to the resident's home if the subject matter of the mailings was found by the resident to be sexually offensive. Chief Justice Burger stated in his opinion:

> "Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Rowan,* 397 U.S. at 736-37.

In explaining his opinion, the Chief Justice continued:

> "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.
>
> ....
>
> "We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow

> of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." *Rowan,* 397 U.S. at 737-38.

In an earlier case, *Kovacs v. Cooper, supra,* this Court upheld an ordinance prohibiting the use of sound trucks emitting "loud and raucous noises," reasoning that a person in his home or even in the street is particularly helpless to escape interference with his privacy except through protection of the municipality. *Kovacs,* 336 U.S. at 87.

In addition, the Court stated:

> "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within the constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people." *Kovacs,* 336 U.S. at 83.

In *Breard v. Alexandria,* 341 U.S. 622, 625-26 (1951), this Court, in upholding a municipal ordinance regulating door-to-door magazine solicitations at private residences, retained this rationale, noting:

> "that opportunists . . . cannot be permitted to arm themselves with an acceptable principle, such as . . . a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose."

In commenting on the effects of unregulated picketing, Justice Black in his concurring opinion in *Gregory v. City*

of Chicago, 394 U.S. 111 (1969), emphasized that the family home should be protected:

> "And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life. Men and women who hold public office would be compelled, simply because they did hold public office, to lose the comforts and privacy of an unpicketed home. I believe that our Constitution, written for the ages, to endure except as changed in the manner it provides, did not create a government with such monumental weaknesses. Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." *Gregory*, 394 U.S. at 125-26.

Many other federal and state decisions also have determined residential picketing to be disruptive of the feelings of well-being, tranquility, and privacy that one is entitled to enjoy in his home and, thus, subject to prohibition or regulation. These cases have held that regulation is not an infringement of the First Amendment right to free speech in that the restriction of picketing and concomitant speech is in furtherance of a legitimate and substantial state interest—protection of the right of privacy. *See City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1971);

State v. Zanker, 179 Minn. 355, 356, 299 N.W. 311 (1930); *State v. Perry*, 196 Minn. 481, 482, 265 N.W. 302 (1936); *Pipe Machinery Co. v. De More*, 76 N.E.2d 725, 727 (1947); *Hebrew v. Davis*, 38 Misc. 2d 173, 177-78, 235 N.Y.S.2d 318, 323-24 (1962); *Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975).

As established by these cases, the right of privacy in the home is a clearly favored right in both federal and state courts. Significantly, this right of privacy may be protected from intrusive and disruptive speech through the regulatory efforts of states and municipalities.

In deciding *Brown v. Scott*, 602 F.2d 791 (7th Cir. 1979), the Seventh Circuit gave no consideration to the purpose of the statute involved—the protection of the privacy of the home. The court treated the statute as simply one more instance of conflict between the police power of the state and the First Amendment rights of individuals. The court merely stated that the rights affected by the picketing statute in *Mosley* were the same as those in *Brown*. *Brown*, 602 F.2d at 794. Such an analysis utterly ignores the circumstances affected by the statute and the reasons for its enactment. The statute was passed to protect the preeminent right of the citizen to the privacy of the home. The statute in *Mosley* was adopted for different purposes and to affect different circumstances. Protection of right of privacy was not in issue in *Mosley*. The failure of the court below to fully recognize and consider the special circumstances affected by the statute and the special reasons for which it exists is certain error. As Justice Frankfurter indicated in *Kovacs:*

> "'It is imperative that, when the effective exercise of

these rights [speech] is claimed to be abridged, the courts should "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged regulations.' "

The Illinois statute attempts to strike a delicate balance between the competing interests in equal protection, free speech, and privacy of the home. This approach is constitutionally appropriate.

> "A State may 'direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.' Lawmaking is essentially empirical and tentative, and in adjudication as in legislation the Constitution does not forbid 'cautious advance, step by step, and the distrust of generalities.' " *Hughes v. Superior Court,* 339 U.S. 460, 468-69 (1950) (citations omitted).

The Court of Appeal, however, rejected the considered judgment of the State of Illinois because the state had not achieved what the court considered to be a perfect balance. Moreover, the court reached its conclusion without considering the paramount importance of protecting residential privacy. The decision, therefore, fails to follow the guidance given by this Court and severely limits the ability of state and local governments to respond to the urgent need to protect the peace and security of the homes of citizens such as amicus Cornell.

CONCLUSION

The court in *Brown* stated in summary:

> "Our holding implies neither disparagement of the important state interest in protecting the peace and privacy of the home nor an opinion that the state may not prohibit or regulate residential picketing in a manner consistent with the equal protection clause as interpreted in *Mosley." Brown,* 602 F.2d at 795 (footnote omitted).

Regardless, the court invalidated the Illinois residential picketing statute as constitutionally infirm. However, the lower court did not evaluate the narrowly drawn Illinois statute in accordance with clear Supreme Court precedent. The court simply ignored the principal weight that is to be given a state's compelling interest to protect the right of its citizens to privacy in their homes. In balancing competing interests to determine the constitutionality of a statute specifically designed to protect residential privacy, the court considered the statute's potential conflict with the right to free speech but did not consider the substantial, superseding importance of protecting privacy in the home. Case law demonstrates that failure to balance these competing interests constitutes clear error.

For these reasons, this Court should set aside the decision of the Seventh Circuit Court of Appeals.

DATED: February 21, 1980.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBERT K. BEST
ROBIN L. RIVETT
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amici Curiae
Pacific Legal Foundation
and Clyde W. Cornell

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-703.

CAREY,
APPELLANT,

v.

BROWN,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

Motion of New England Legal Foundation for Leave to File Brief as Amicus Curiae, and Brief of Amicus Curiae New England Legal Foundation in Support of Appellant.

WILLIAM H. BECKER,
LANDFIELD, BECKER, GREEN & FRENCH,
Suite 950,
1819 H Street, N.W.,
Washington, D.C. 20006.
(202) 293-1919

JOHANNA HARRIS,
HARRISON A. FITCH,
NEW ENGLAND LEGAL FOUNDATION,
110 Tremont Street,
Boston, Massachusetts 02108.
(617) 482-1410

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

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BROWN,
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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Motion of New England Legal Foundation for Leave to File Brief as Amicus Curiae.

Pursuant to Rule 42 of the Rules of the Supreme Court, New England Legal Foundation moves the Court for leave to file its brief amicus curiae bound with this motion in support of appellant.

New England Legal Foundation has the consent of counsel for appellant to the filing of this brief. Counsel for the appellee would not consent. Copies of appellant's letter and our request to appellee are on file with the Clerk of the Court.

New England Legal Foundation (NELF) is a non-profit, tax-exempt corporation, organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on matters affecting the broad public interest. Policy for NELF is set by a board of directors com-

posed of New England citizens, the majority of whom are attorneys. The board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

New England Legal Foundation's attorneys participated in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978) as counsel for amicus curiae The New England Council, Inc. (See 435 U.S. at n. 22.)

The Foundation, due to its unique public interest perspective and established interest in First Amendment issues involving New England residents, can provide the Court with a more complete argument of the issues in this case.

The Foundation is particularly concerned that if the Court of Appeals' ruling is affirmed, then the rights of citizens to domestic privacy will be lost. It is New England Legal Foundation's position that the Court of Appeals' decision should be reversed.

For the foregoing reasons New England Legal Foundation respectfully requests permission to participate as amicus curiae and to file the attached brief in support of appellant.

By its Attorneys,

WILLIAM H. BECKER,
LANDFIELD, BECKER, GREEN & FRENCH,
Suite 950,
1819 H Street, N.W.,
Washington, D.C. 20006.
(202) 293-1919

JOHANNA HARRIS,
HARRISON A. FITCH,
New England Legal Foundation,
110 Tremont Street,
Boston, Massachusetts 02108.
(617) 482-1410

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

Brief of Amicus Curiae New England Legal Foundation in Support of Appellant.

Introductory Statement.

New England Legal Foundation, a non-profit corporation, broadly representative of New England interests, files this brief as amicus curiae in support of appellant.

This brief discusses the circumstances in which the state may properly restrict the place of speech. The brief demonstrates that the restrictions set forth in the Illinois Residential Picketing statute are legitimately based on the place of speech without reference to a message. Once it is established that the provisions of the ban are determined by

the place of speech, this brief demonstrates that the benefits of restricting expression at the place of a person's private residence outweigh the costs of speech limitation.

New England Legal Foundation adopts appellant's statement of the facts and opinions below.

Questions Presented.

New England Legal Foundation believes that this appeal presents the following issues:

1. Whether the state may restrict the place of speech.
2. Whether in the instant case, the provisions of the ban on residential picketing are based on the place of speech, without reference to a message, and are precisely tailored to serve a legitimate and substantial public interest.
3. Whether in the instant case, the benefits of restricting expression at the place of a person's private residence and sanctuary outweigh the costs of speech limitation.

Summary of Argument.

1. In order to protect the safety, peace and well-being of its residents, the state may impose reasonable restrictions on the place of speech. A state restriction does not violate the First Amendment so long as the restriction is aimed at the communication's compatibility with the intended activities of a place, rather than at its message.
2. In the instant case, the ban on residential picketing is based on the incompatibility of picketing with a person's right to be left alone in his private domicile. The statute is precisely tailored to protect the legitimate

interests of residents and to guard those rights of expression that could not be effectively protected anywhere else.
3. In the instant case, the benefits of protecting citizens' rights to private sanctuary outweigh the costs of limiting speech. The communication of the picketers can be effectively redirected to other locations. However, the lost privacy interests are irreplaceable.

Argument.

I. The State May Restrict the Place of Speech.

This Court has recognized that the right to communicate is not limitless. *Schneider v. State,* 308 U.S. 147 (1939); *Poulos v. New Hampshire,* 345 U.S. 395 (1953); *Rowan v. United States Post Office Department,* 397 U.S. 728 (1970). As Justice Reed stated:

> The First and the Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life. *Breard v. Alexandria,* 341 U.S. 622, 642 (1951).

In order to protect the safety, peace and well-being of its residents, the state may impose reasonable restrictions on the location of speech. *Thornhill v. Alabama,* 310 U.S. 88, 105 (1940); *Cantwell v. Connecticut,* 310 U.S. 296, 304 (1940); *Cox v. New Hampshire,* 312 U.S. 569, 575 (1941); *Poulos v. New Hampshire,* 345 U.S. at 398; *Adderley v. Florida,* 385 U.S. 39, 46-48 (1966).[1] Restrictions on the location of speech

[1] These decisions have consistently recognized that reasonable time, place and manner regulations of picketing may be necessary to further significant government interests.

are reasonable if its expression is incompatible with the normal activities of a particular place. *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972). To make this determination, the state must individually examine the uses and purposes of each forum. The state may ban the picketing of a courthouse, for example, because the administration of justice must be fair and free from disruptions and pressures. *Wood v. Georgia,* 370 U.S. 375, 384-385 (1962); *Cox v. Louisiana,* 379 U.S. 559, 561 (1965). The state may ban demonstrations at a foreign embassy because the disturbance of foreign officials jeopardizes foreign relations. *Frend v. United States,* 100 F. 2d 691, 693 (D.C. Cir. 1938), *cert. denied,* 306 U.S. 640 (1939). See also *Jewish Defense League, Inc. v. Washington,* 347 F. Supp. 1300 (D. D.C. 1972).

The state's authority to restrict the place of speech also extends to banning those forms of communication that are incompatible with a particular location. The state may ban loudspeakers, sound trucks and other amplification devices from residential neighborhoods because loud noise interferes with normal, private domestic life. *Kovacs v. Cooper,* 336 U.S. 77, 89 (1949). See also *People v. Phillips,* 147 Misc. 11, 263 N.Y. Supp. 158, 159 (1933); *Maupin v. City of Louisville,* 284 Ky. 195, 144 S.W. 2d 237, 240 (1940); *Hamilton v. City of Montose,* 109 Colo. 228, 124 P. 2d 757, 761 (1942). The state may ban mass assemblies at jailhouses. *Adderley v. Florida,* 385 U.S. at 47, 48. The state may ban prisoners' statements to the press in specific jail cells. *Pell v. Procunier,* 417 U.S. 817, 827 (1974); *Saxbe v. Washington Post Co.,* 417 U.S. 843, 846-850 (1974). The state may ban a political speech at a military base. *Greer v. Spock,* 424 U.S. 828, 837-838 (1976).

In all of the above cases, the state's restriction on speech was aimed not at the nature of the message, but at the communication's incompatibility with the intended activities of a place.

II. In the Instant Case, the Provisions of the Ban on Residential Picketing Are Based on the Place of Speech, without Reference to a Message, and Are Precisely Tailored to Serve a Legitimate and Substantial Public Interest.

The statute challenged here prohibits picketing at the place of a person's private residence because picketing interferes with the quiet, secure and stable enjoyment of family life.[2] The statute recognizes that the use of a residence as a "place of business" or as a "place of holding a meeting" or as "premises commonly used to discuss subjects of general public interest" extends the activities of the residence beyond those of a private sanctuary,[3] and accordingly it permits picketing at such places.[4] Moreover, the statute recognizes that when a householder makes his residence a "place of employment" for someone else, he waives the protection of

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[2] The statute's preamble states:

> The Legislature finds and declares that men in a free society have the right to quiet enjoyment of their homes; that the stability of community and family life cannot be maintained unless the right to privacy and a sense of security and peace in the home are respected and encouraged; that residential picketing, however just the cause inspiring it, disrupts home, family and communal life. Ill. Rev. Stat. c. 38, § 21.1-1.

[3] Courts have recognized that the normal activities of a person's residence can extend beyond those of a private sanctuary. See *Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing,* 433 Pa. 578, 252 A. 2d 622 (1969).

[4] The substantive provisions of the statute are:

> It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest. Ill. Rev. Stat. c. 38, § 21.1-2.

privacy in disputes related to the "place of employment." The employer's residence in these disputes is the only place at which picketing could be meaningfully directed.[5] Although picketing in these disputes by necessity reflects labor-related issues, the exemption is effectively determined by the place of the dispute, and not by reference to the content of the message. The provisions of the statute are therefore consistent with the requirement that the state individually examine the uses and purposes of each place and tailor restrictions on speech to be compatible with these uses and purposes.

The Appeals Court below interpreted this statute as allowing picketing at a residence used as a place of employment only if the subject matter was labor-related. *Brown v. Scott,* 602 F. 2d 791, 793-794 (7th Cir. 1979). Such a content-based restriction on speech was struck down in *Police Department of Chicago v. Mosley,* 408 U.S. 92, 99 (1972). In *Mosley,* the City Ordinance banned non-labor picketing within 150 feet of a school on the ground that it was more disruptive than labor picketing. Since there was no showing in the record that labor picketing was, in fact, less disruptive, the only conceivable basis for the distinction among picketers was the message on the picket sign.[6]

[5] Persons seeking to communicate and having only one possible forum have been allowed use of that forum, when others with multiple options have not. *Albany Welfare Rights Organization v. Wyman,* 493 F. 2d 1319, 1323 (2d Cir. 1974). The public's interest in containing picketing to the locus of dispute is also not a novel concept. See *Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe,* 315 U.S. 722, 727 (1942); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.,* 391 U.S. 308, 320 (1968).

[6] The City argued that non-labor picketing is more prone to produce violence than labor picketing. The Court stated that predictions about imminent disruption from picketing involve judgments appropriately made on an individual basis and not by means of broad classifications based on subject matter. 408 U.S. at 100 and 101.

But here, the distinction between labor and non-labor content is not a necessary or even a reasonable basis for interpreting the provisions of the statute challenged. Since this statute broadly permits picketing at a residence used as a "place of business," the only instance where the Appeals Court's concern about content-based restrictions could conceivably be at issue is a residence used as a "place of employment" but not as a "place of business." Thus, if the Mayor of Chicago[7] had lived above his manufacturing establishment, then the statute contemplates all forms of picketing because such a residence is used as a "place of business." But if he merely employed maids and groundkeepers, then the only relevant place these employees could picket in the event of a controversy is where they were employed. The statute's exemption for picketing in that case would not deny, but rather assure equal protection.

The Appeals Court expresses concern that, in the event of a labor dispute between the Mayor and his gardener, the state treats the gardener's picketing differently from other forms of picketing.[8] Such a concern is not mandated by the Equal Protection Clause of the Fourteenth Amendment of the Constitution. The Equal Protection Clause does not require that "things which are different in fact or opinion . . . be treated in law as though they were the same." *Tigner v. Texas,* 310 U.S. 141, 147 (1940). It does require that differences be directly related to the legitimate legislative objective of the statute. *De Jonge v. Oregon,* 299 U.S. 353, 364 (1937); *Lovell v. Griffin,* 303 U.S. 444, 450-451 (1938); *Schneider v. State,* 308 U.S. at 164; *Shelton v. Tucker,* 364 U.S. 479, 487-489 (1960); *N.A.A.C.P. v. Button,* 371 U.S. 415, 438-439 (1963); *Cox v. Louisiana,* 379 U.S. at 578-579; *Davis v. Francois,*

[7] The Mayor's home was the site of picketing in the instant case. See *Brown v. Scott,* 462 F. Supp. 518, 519 (N.D. Ill. 1978).

[8] *Brown v. Scott,* 602 F. 2d at 794.

395 F. 2d 730, 734 (5th Cir. 1968); *Reed v. Reed,* 404 U.S. 71, 76 (1971). In the instant case there is an exact fit between the distinction drawn and the result desired. The distinction here allows for communication which could not be effectively received anywhere else. At the same time, it is consistent with the legislative objective of protecting private residences.

To argue that the state should permit all forms of picketing by all persons once the Mayor's gardener engages in picketing the Mayor's residence in the event of a labor dispute, is to confuse the protection afforded to the gardener to speak with the protection afforded to the Mayor not to be indiscriminately harassed in his home. There is no reason why the state cannot simultaneously protect the First Amendment rights of the gardener and the privacy rights of the Mayor. If this Court should affirm, then in the event of a labor dispute between Mayor and gardener, the state must either permit everyone including the gardener to picket, or let no one picket. If the state deems no one can picket, then the rights of the gardener are unnecessarily lost. Reversing the Court below, and upholding the statute, accommodates both the Mayor and gardener. No other alternative form of regulation would abate the evils of a disorderly society without infringing unnecessarily on a First Amendment right. *Shelton v. Tucker,* 364 U.S. at 488.

Allowing pickets at the Mayor's residence, when it becomes a place of employment involved in a labor dispute, is the only instance in which such expression is relevant to the use of the dwelling. At no other time and for no other purpose would the Mayor's residence rise to the level of a place of public dialogue. The object of the picketing in *Mosley,* by contrast, was a public school. Public schools in a community are important institutions and are often the focus of significant grievances. *Grayned v. City of Rockford,* 408 U.S. at 118. Although schools were not created primarily for public dialogue, Laurence Tribe, one noted commentator, points out, their purposes are closely linked to the expression of ideas. The robust exchange of ideas is an important part of the educational process.[9] See *Tinker v. Des Moines School District,* 393 U.S. 503 (1969). As Justice Brennan stated in *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967):

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." *Shelton* v. *Tucker,* [364 U.S.] at 487. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." *United States* v. *Associated Press,* 52 F. Supp. 362, 372 [S.D. N.Y. 1943].

In the case of a public school, no objective is served by allowing pickets with one message and disallowing pickets with another. On the other hand, residential areas are not as closely linked to public expression. *Cohen v. California,* 403 U.S. 15, 21 (1971). This distinction between public school and private residence reinforces the conclusion that the Illinois statute's provisions are precisely tailored to serve a legitimate and substantial public interest.

III. In the Instant Case, the Benefits of Restricting Expression at the Place of a Person's Private Residence and Sanctuary Outweigh the Costs of Speech Limitation.

Once it is established that the provisions of the instant ban are determined by the place of speech, this Court should judge the statute's constitutionality by balancing the rights protected by the state against the rights guaranteed by the

[9] L. Tribe, *Constitutional Law,* §§ 12-21 (1978).

First Amendment. *Konigsberg v. State Bar of California,* 366 U.S. 36, 51 (1961); *N.A.A.C.P. v. Button,* 371 U.S. at 444; *Grayned v. City of Rockford,* 408 U.S. at 116; *Pell v. Procunier,* 417 U.S. 817 (1974); and *Lehman v. City of Shaker Heights,* 418 U.S. 298, 302-303 (1974).

In the case at bar, the Illinois statute protects a person's right to be left alone in the privacy of his home. The legitimacy of this right has been respected by the common law and repeatedly upheld in the courts. Over 80 years ago, Justice Brandeis wrote:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual. . . . Warren and Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193, 196 (1890).

The home is a man's "castle" and his "sanctuary." *Pipe Machinery Co. v. De More,* 36 Ohio Op. 342, 343-344, 76 N.E. 2d 725, 727 (1947). "The right to be left alone is indeed the beginning of all freedom." *Public Utilities Commission v. Pollak,* 343 U.S. 451, 467 (1952) (Justice Douglas—dissent.) As Justice Burger stated in *Rowan v. United States Post Office Department,* 397 U.S. 728, 737 (1970):

> The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality. . . . *Camara* v. *Municipal Court,* 387 U.S. 523 (1967).

The home is the place where one retreats from his business associates, neighbors and friends to enjoy a certain solitude he is unlikely to find anywhere else.[10] The home may be the only place where one can shut off unwanted communication

[10] Kamin, *Residential Picketing and the First Amendment,* 61 N.W. L. Rev. 177 (1966-1967).

or an unwelcomed stranger. *Breard v. Alexandria,* 341 U.S. at 644, 645. The home is a place to rest and recharge. *City of Wauwatosa v. King,* 49 Wis. 2d 398, 182 N.W. 2d 530, 537 (1971). The home is a place where family is raised, where parents instill their personal values in children.[11] The home thus offers substantial and necessary benefits to members of our society. In order to enjoy these benefits, a person must be able to stay in his home for as long as and whenever he wants. *Organization for a Better Austin v. Keefe,* 115 Ill. App. 2d 236, 253 N.E. 2d 76 (1969), *rev'd on other grounds,* 402 U.S. 415 (1971). With respect to these benefits, the home has virtually no substitute.

In the case of residential picketing, the state has a substantial interest in protecting a person's right to domestic privacy. Residential picketing would invade the privacy of a person's home in an intolerable way.[12] Picketing is an appeal to the emotions. *Superior Derrick Corp. v. N.L.R.B.,* 273 F. 2d 891, 896-897 (5th Cir. 1960). Picketing is distinguished from pure speech by its ability to cause the viewer personal discomfort.[13] Picketing can create tension in the viewer and capitalize on the viewer's anxieties. As the Court highlighted in *City of Wauwatosa v. King:*

> To those inside and to the neighbors, the home becomes something less than a home when and while the picketing, demonstrating and parading continue. . . . The newsworthiness of the situation stems in part from the tensions created and pressures focused on the home. Such tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical

[11] *Residential Picketing and the First Amendment* at 206-207.

[12] Note, *First Amendment Analysis of Peaceful Picketing,* 28 Maine L. Rev. 203, 207 (1976).

[13] *First Amendment Analysis of Peaceful Picketing* at 208.

> to family privacy and truly domestic tranquility. 182 N.W. 2d at 537.

Picketing forces the homeowner to be exposed to a specific communication or expressive activity. The homeowner thus becomes a captive in his own home.[14] Picketing could disrupt his sleep, conversation or whatever he does at home. Unlike the accosted passersby in *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212 (1975), the disruption is not momentary. The invasive effects of picketing could extend beyond the target home. Neighbors, with no attachment to the controversy, become captives to the communication. Mail carriers and delivery men are hindered. Children cannot make their way to and from school.[15] As Justice Black, concurring in *Gregory v. City of Chicago,* 394 U.S. 111 (1969), stated:

> I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown. 394 U.S. at 125-126.

"[T]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."

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[14] The harmful consequences of being held a captive audience in one's private residence are magnified by the courts' prevention of captive audiences in even less private forums. In *Lehman v. City of Shaker Heights,* 418 U.S. at 305-308 this Court sustained a municipality's policy of barring political advertising on city buses. That we are often captives outside the sanctuary of the home and subject to objectionable speech and sound does not mean that we must be captives elsewhere. *Public Utilities Commission v. Pollak,* 343 U.S. at 468.

[15] *Residential Picketing and the First Amendment* at 228.

Rowan v. United States Post Office Department, 397 U.S. at 736.[16] In the case at bar, the scales tip unequivocally to the side of personal privacy.

To be sure, picketing at a private residence attracts greater media coverage and can make a forceful impression. Yet these alleged benefits of picketing result from the inappropriateness of the forum as a center for debate. Picketing, with its powerful emotional overtones, can cause the target homeowner to react inappropriately out of annoyance or intimidation. *Brown v. Scott,* 462 F. Supp. at 532-533. This alleged advantage results directly from the captivity of the homeowner. Picketing in the streets in front of private residences affords the picketers a low-cost means of communication. This alleged advantage is hardly unique or substantial, since picketing any other street is equally inexpensive.

The existence of alternative locations is not by itself a justification for abridging speech at a particular place. *Schneider v. State,* 308 U.S. at 163. However, when the advantages of this forum are to be weighed against its disruption of private life, it is proper to note the wide opportunity for other avenues of communication. In fact, other forums that are more relevant to the dispute (e.g., picketing City Hall rather than the Mayor's residence) could offer greater benefits. Moreover, residential picketing is not the only avenue of address for the weak and powerless.[17]

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[16] In *Rowan,* this Court upheld a statute restricting what types of postal communications could enter the home when such communication was per se inconsistent with the privacy interests of the resident. Individual privacy, this Court noted, is entitled to greater protection in the home than on the streets. 397 U.S. at 736-737.

[17] *Residential Picketing and the First Amendment* at 207-208.

The public has a clear interest in guaranteeing free expression of ideas. *Cohen v. California,* 403 U.S. at 24. However, a ban on residential picketing does not stifle ideas. It merely directs that certain locations are inappropriate forums for communication. The statute at issue here does not leave the public with incomplete or inaccurate views. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339 (1974). It does not have an unequal effect on various types of messages. It is not for or against any viewpoint. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 791 n.31 (1978).

Unquestionably, this is a case where the benefits to citizens outweigh any possible incidental intrusion on First Amendment rights. *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 461 (1958); *Barenblatt v. United States,* 360 U.S. 109, 126 (1959); *Communist Party v. Control Board,* 367 U.S. 1, 90-91 (1961). In no way do the particular provisions of the Illinois statute or the particular facts surrounding this case negate such a conclusion.[18]

Conclusion.

This case does not rest on the views of those who picketed the home of Chicago's Mayor. The main issue is the protection of a person's right to be left alone in his private residence and sanctuary. The Illinois statute legitimately recognizes what characteristics of a person's place of residence may dilute this right to be left alone. These characteristics of a person's place of residence can be enumerated without refer-

[18] The courts have held that the home of a public figure, such as the Mayor of Chicago, is not made a public forum by virtue of the status of its resident. On the contrary, one's public status is all the more reason for the protection of privacy. *Gregory v. City of Chicago,* 394 U.S. at 125, 126.

ence to the content of any message. To search vainly for a distinction based upon content, but irrelevant to the circumstances contemplated by the statute, advances no First Amendment right. The Court below should be reversed.

Respectfully submitted,

By its Attorneys,

WILLIAM H. BECKER,
LANDFIELD, BECKER, GREEN & FRENCH,
Suite 950,
1819 H Street, N.W.,
Washington, D.C. 20006.
(202) 293-1919

JOHANNA HARRIS,
HARRISON A. FITCH,
New England Legal Foundation,
110 Tremont Street,
Boston, Massachusetts 02108.
(617) 482-1410

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